University of Alberta

Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective

Vijayashri Sripati ©

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ABSTRACT

This thesis examines and compares from a human rights perspective, both the constitution-making processes and the bills of rights of the Indian and the South African constitutions. The emphasis in this study is on the *making* of constitutions. It examines the impact on their contents of the radically divergent processes by which these constitutions were forged and the different international landscapes amidst which those processes occurred. The overarching thematic argument of this thesis is that a constitution may play a transformative role on further constitutionalism in four critical ways: (1) by defining the nature of the state, including a broad equality provision; (2) by addressing social and societal oppression and past injustices (3) by defining property and land rights; and (4) by defining social and economic rights. This thesis examines and compares how the framers in India and South Africa used the framework of rights to achieve these tasks.

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DEDICATION

I dedicate this essay to my dearest father, Mr. Sripati Ram Mohan Rao for nurturing my childhood love for learning, writing and (public) speaking.

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CONSTITUTIONALISM IN INDIA AND SOUTH AFRICA: A COMPARATIVE STUDY FROM A HUMAN RIGHTS PERSPECTIVE

Introduction

"The freedom of India began in South Africa and our (India's) freedom will not be complete till South Africa is free."[1] These poignant words capture the historic links between India and South Africa. Indeed, Mahatma Gandhi, who later led the Indian national movement had coined and first tested Satyagraha[2] and civil disobedience - his unique non-violent methods - in resisting discrimination as a young lawyer in South Africa.[3] Thereafter, on his return to India, he deployed these methods successfully in India's freedom struggle rendering it a startlingly unique movement in the world.[4] The heritage of Gandhi and of Satyagraha is thus a common heritage of South Africa and India.

Although constitutionalism is an elusive term, democratic governance and rights protection are broadly accepted to be its essential elements[5] and judiciaries have traditionally been regarded as its key promoters. This thesis examines and compares from a human rights perspective, both the constitution-making processes and the bills of rights of the Indian[6] and

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[1] Nelson Mandela, Speech delivered at the Rajiv Gandhi Foundation, New Delhi, India, Jan. 1995 (quoting the late Rajeev Gandhi, India's former Prime Minister), online: < http://www.anc.org.za/ancdocs/history/mandela/1995/sp950125a.html>; See generally Mahatma Gandhi, *An Autobiography, or the Story of My Experiments with Truth* (Ahmedabad: Navjeevan Publishing House, 1966).

[2] See M.K. Gandhi, *Non-Violent Resistance (Satyagraha)* (New York: Schoken Books, 1961). *Satya* in Sanskrit means truth and *Agraha* is used to describe an effort or endeavour.

> The term *Satyagraha* was coined by me in South Africa to express the force that the Indians there used for full eight years and it was coined to distinguish it from the movement then going on in the United Kingdom and South Africa under the name of Passive Resistance. Its root meaning is holding on to truth, hence truth-force. I have also called it Love-force or Soul-force. *Ibid.* at 6.

[3] See Robert C. Cottrell, *South Africa: A State of Apartheid* (Philadelphia: Chelsea House Publishers, 2005). In South Africa, Gandhi campaigned against discrimination including the legislation that denied voting rights (in Natal) to Indians, the Transvaal Registration Law requiring Indians to carry passes, the poll tax and the draft South African Constitution which denied political rights to Indians. *Ibid.* at 60.

[4] For a critical look at the unique features of India's freedom struggle see Bipan Chandra, *India's Struggle for Independence 1857-1947* (New Delhi: Penguin Books, 1989).

[5] See generally Louis Henkin, *Elements of Constitutionalism - Occasional Paper Series* (New York: Center for the Study of Human Rights, 1994); Jon Elster & Rune Stalgstad, *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988); For an intellectually provocative account of how constitutionalism flourished during the heyday of colonialism see Upendra Baxi, "Constitutionalism as a Site of State Formative Practices" (2000) 21 Cardozo L. Rev. 1183. [Baxi, "Constitutionalism"]

[6] Part III of the Indian Constitution contains an array of judicially enforceable civil and political rights termed as "Fundamental Rights." Hereinafter, the terms "Part III" and "Fundamental Rights" shall be used

the South African Constitutions. The emphasis in this study is on the *making* of constitutions. It examines the impact on their contents of the radically divergent processes by which these constitutions were forged and the different international landscapes amidst which those processes occurred.

Constitutions have an exalted place in the lives of nations because they have the potential to shape institutions and transform society for the benefit of the present and future generations. The overarching thematic argument of this thesis is that a constitution may play a transformative[7] role on further constitutionalism in four critical ways: (1) by defining the nature of the state, including a broad equality provision; (2) by addressing social and societal oppression and past injustices (3) by defining property and land rights; and (4) by defining social and economic rights. I examine and compare how the framers in India and South Africa used the framework of rights to achieve these tasks. The framers of the South African Constitution have keenly followed India's constitutional experiences. This also invites a comparison of constitutionalism in these two countries.[8]

A comparison of these two constitutions must take into account two important differences. First, the Indian Constitution, a post-colonial one was conceived and drafted before the adoption in 1948 of the Universal Declaration of Human Rights[9] (UDHR), identified as the onset of the modern international human rights movement. Drafted some fifty years later, the South African Constitution of 1996 emerged when the hegemonic influence of the

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interchangeably. Part IV of the Constitution is termed "Directive Principles of State Policy" and enshrines an array of socio-economic principles (judicially non-enforceable) that embody the social justice vision of its framers. Hereinafter, the terms "Part IV" and "Directive Principles" shall be used interchangeably. These two parts together comprise the conscience of the constitution. By bill of rights, I refer to the substantive provisions of Parts III & IV of the constitution.

[7] By transformative role, I mean the power and potential of a constitution to radically transform or alter its society and the structures of power therein. A transformative constitution is not one that simply establishes democratic governance.

[8] See *e.g.* Hassen Ebrahim, "The Making of the South African Constitution: Some Influences," in Penelope Andrews & Stephen Ellmann, eds., *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg: Whitwatersand University Press, 2001) 85 at 88-89; Van Wyk *et al. Rights and Constitutionalism: The New South African Legal Order* (Kenwyn: Juta & Co. Ltd., 1994).

[9] *See Universal Declaration of Human Rights, reprinted in* Human Rights: A Compilation of International Instruments 20-40 (United Nations, New York, 1993). [hereinafter the terms UDHR and Universal Declaration shall be used interchangeably].

modern international human rights movement was at its peak, after an internationally scripted normative constitutional framework had evolved.[10]

The second factor that accounts for differences between the two constitutions is the radically divergent processes by which they were forged. Constitution-making in India was the final stage of a protracted freedom struggle; the process was dominated by elites of the Indian National Congress (INC), a mass-based political party that was at the vanguard of the national movement and that, due to the exigencies of the time, allowed for little public participation.[11] Meanwhile, the South African Constitution is a more revolutionary document, emerging from a process that was consciously designed to be a sharply participatory one.[12]

I have conceptualized this study as a comparison of two constitutions — one conceived and drafted before the Universal Declaration,[13] the other sculpted long after its inception. The inspirational impact of the UDHR and/or international human rights law is a dominant theme in the mainstream literature on post-World War II constitutions, including the Indian Constitution. However, little attention has been given to the role that India played in the making of the UDHR. Therefore, I will first preface my analysis of constitution-making in

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[10] See *e.g.* D. van Wyk *et al* eds., *Namibia: Constitutional and International Law Issues* (Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 1991) (The 1982 Constitutional Principles included both a process for constitution-making through a democratic election and the creation of a Constituent Assembly and a set of principles to guide the Constituent Assembly in its formulation of the Constitution) ; Venice Commission, online: Venice Commission <http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E>;

[11] *See generally* Granville Austin, The Indian Constitution: Cornerstone of a Nation (Oxford University Press, New Delhi, 2001); Shiva Rao, The Framing of the Indian Constitution: A Study (Indian Institute of Public Administration, New Delhi, 1966).

[12] *See generally* Hassen Ebrahim, 'The Soul of a Nation: Constitution-making in South Africa (Oxford University Press, 1998). [Ebrahim, Soul of a Nation]

[13] *See generally* Mary Ann Glendon, A World made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (Random House, New York, 2001).
The genesis of the Indian Constitution began long before its actual drafting commenced in December 1946. However, factually speaking, the actual making of the Indian Constitution - the provisions of Part III in particular, and the making of the UDHR were parallel events. The Indian Constitution was drafted between December 1946 and November 1949 whereas the UDHR's drafting took place between January 1947 and December 1948. Therefore, chronologically speaking, the sculpting of the Indian Constitution precedes the making of the UDHR although the latter came into force one year before the Indian Constitution did. See *infra* Table 1.

India with a brief discussion of India's active participation in the drafting of that historical text.[14]

This thesis comprises five parts. In Part I, I briefly present the similarities and differences between the two countries that make a comparative study of their constitutions meaningful. In Part II, I examine India's elitist constitution-making process and point to the efforts that India's constitution-makers made to render their process more participatory. South Africa's participatory constitution-making process is the topic of Part III, with a preface summarizing the genesis of participatory constitution-making. I therefore analyze the African experience with the "independence" and "second-generation" constitutions and probe the factors that spurred the birth of participatory constitution-making in the continent. In Part IV, I examine the making of the bills of rights of both constitutions, highlighting the influence of the Indian Constitution, and the vibrant jurisprudence that has been woven around it, on the content of South Africa's bill of rights.[15] I conclude in Part V with critical reflections on the roles of the two constitutions in furthering constitutionalism. While I applaud South Africa for its participatory constitution-making, I draw on the Indian experience to challenge the premise that a constitution's legitimacy hinges on popular participation, arguing that this bit of accepted wisdom needs to be viewed critically.

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[14] For this purpose, I will first relate the circumstances that led to India's admission to the United Nations (UN) and then move on to examine India's contribution to the UDHR. It is against this background that I will turn to examining constitution-making in India.
See *infra* Table 2 which captures the convergence between the rights provisions in the Indian Constitution and the UDHR.

[15] See *e.g.* Pierre de Vos, "A Bill of Rights as an Instrument for Social and Economic Transformation in a New South African Constitution: Lessons from India," in Mervyn Bennun & Malyn D.D. Newitt, eds., *Negotiating Justice: A New Constitution for South Africa* (London: University of Exeter Press, 1995) 81.

1. Comparing Constitutionalism in India and South Africa: Comparing the Incomparable? Not Exactly.

1.1. Similarities and Differences between the Indian & South African Constitutions

Constitutional experts argue that that the presence of a certain number of common constitutional features makes a comparison of constitutions including those that are divided by historical time and geographical space justifiable.[16] India's two centuries of British rule - that ended on August 15, 1947 - began not with the swift fall of her frontiers to marauding foreign invaders. Indeed, lured by India's spices and silks, the English first arrived as traders in the early seventeenth century.[17] South Africa's colonial history has similar beginnings. An influx of the French, Huguenot refugees, the Dutch, and Germans (all of whom collectively comprise the Afrikaner population today) into South Africa followed the arrival of the Dutch East India Company in 1652.[18] The lure of diamonds and gold in the Witwatersrand region beckoned the British to immigrate to and invest in South Africa.[19] Following their victory in the Anglo-Boer wars, the British incorporated the independent Boer Republics of the Transvaal and Orange Free State into the British Empire.[20] The fusion of these two republics with the British colonies of the Cape and Natal in 1910 gave birth to the Union of South Africa, that is, the racially divided South Africa.[21] South Africa acquired sovereign status (within the British Empire in 1934) and became a Republic in 1961.[22]

India and South Africa were both trying to escape a bitter past and usher in a new constitutional dawn of freedom and social justice. Constitution-making was therefore

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16 Rett Ludwikowski, "Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis" (2004) 33 Ga. J. Int'l & Comp. L. 1 at 6.
17 See V. D. Mahajan, *Modern Indian History: From 1707 to the Present Day* (New Delhi: S. Chand & Co. Ltd. 2001) at B1-27. The English East India Company arrived in India in 1600 and by 1773 India had come under the political domination of this impersonal corporation. *Ibid.*
18 See Cottrell, *supra* note 3 at 14-16.
19 *Ibid.*
20 *Ibid.* at 65-66.
21 *Ibid.*
22 *Ibid.*

transformative in both cases.[23] These two democratic countries have adopted written constitutions with entrenched bill of rights and embraced the doctrine of constitutional supremacy.[24] Significantly, they share a unified vision of human rights[25] and have reposed faith in the principle of judicial review in their commitment to not just pose "limitations on ordinary political power"[26] but also for translating their vision of social justice.[27]

Furthermore, India is a multi-ethnic and multi-religious nation reflecting a breathtaking diversity of castes, religions, languages and cultures. South Africa is no different with its constitution recognizing eleven national languages[28] and there being many additional recognized ethnic groups. Thus, to use Nelson Mandela's words again, besides "the cold facts of geography and history and the shared passion in pursuit of justice and happiness that bind India and South Africa,"[29] both these countries share a common law tradition and are also ethnically and culturally diverse nations.[30]

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[23] See generally Karl E. Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 S. Afr. J. Hum. Rts. 258.

[24] The Indian Constitution does not explicitly set out the constitutional supremacy principle. However Article 13 that declares the paramountcy of fundamental rights and constitutionalizes the doctrine of judicial review affirms this point. See India Const. Art. 13; See also *Kesavananda Bharati v State of Kerala,* A.I.R. 1978 SC 1461 (holding the "basic structure" of the Indian Constitution to be beyond the amending powers of parliament). Art. 13 states:

> The state shall not make any law which takes away or abridges the rights conferred by this Part [III] and any law made in contravention of this clause shall to the extent of such contravention, be void.

[25] Both constitutions emphasize the protection of civil and political rights *and* socio-economic rights. See *e.g.* S.Afr. Const. Preamble & Bill of Rights, Chapter 2.

[26] Douglas Greenberg, "Introduction" in Douglas Greenberg *et al* eds., *Constitutionalism and Democracy: Transitions in the Contemporary World: The American Council of Learned Societies Comparative Constitutionalism Papers* (New York: Oxford University Press, 1993) at xxi.

[27] See *e.g.* India Const. Parts III - IV & Preamble. The Preamble states:

> We, the people of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic Republic and to secure to all its citizens:
> *Justice, social, economic and political*; Liberty of thought, expression, belief, faith and worship;
> Equality of status and of opportunity; and to promote among them all *Fraternity assuring the dignity of the individual* and the unity and integrity of the Nation; in our constituent assembly this twenty-sixth of November, 1949, do hereby adopt, enact and give to ourselves this Constitution. [emphasis added].

[28] See South Africa Const. § 6.

[29] Mandela, *supra* note 1 at 6.

[30] See Heinz Klug, "South Africa" in Bert Kritzer, ed., *Legal Systems of the World: A Political, Social and Cultural Encyclopaedia* (California: ABCLIO Publications, 2002) 1483 at 1485. South African common law has been described as a "mixed system of civil and common law" whose origins may be traced to the Roman-Dutch law. *Ibid.*

Moreover, a "foundational violence" provides a backdrop for constitution-making in both countries that has informed the construction of their founding charters.[31] In the case of India, it was the cruelty of partition followed by Mahatma Gandhi's assassination by a Hindu fundamentalist.[32] Regarding South Africa, it was the violence that enveloped the constitutional negotiations.[33]

India's constitution-making process was broadly speaking, elitist in nature. The Constituent Assembly was a body created and convened by the British but dominated by the INC members who were indirectly elected not on the basis of universal adult franchise but by the invidious principle of communal representation.[34] In comparison, the South African Constitution which appears to be more revolutionary was forged by a sharply participatory process.

The Indian and South African constitution-making processes took place amidst radically different international political cultures and settings. Far from condemning colonialism international law was central to its development.[35] Therefore, India's liberation was primarily the product – not of international pressure but – of a successfully waged prolonged local anti-colonial movement leavened by the cataclysmic effects of World War II. In contrast, international pressure in part contributed to dismantling apartheid in South Africa.[36] Interestingly, it was India's complaint to the UN General Assembly in 1946 about South

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[31] In the case of India, the partition and the ensuing communal holocaust left their indelible "birthmarks" on or "continuities" in her constitution. See *e.g.* India Const. Part III, Art. 22 cl. (4) – (7) (Preventive Detention Clauses); Vijayashri Sripati, "Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)" (1998) 14 Am. U. Int'l L. Rev. 413 at 436; Upendra Baxi, "Postcolonial Legality," in Henry Schwartz & Sangeeta Ray, eds., *A Companion to Post-Colonial Studies* (Malden: Blackwell Publishers, 2000) 540 at 544-545; Dullah Omar, "Constitutional Development: The African Experience" in Vicki Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (London: Praeger, 2002) 175 at 178.

[32] In June 1947 the British government partitioned India on religious lines into two independent states. What ensued was a panicky exodus of Muslims fleeing to Pakistan and Hindus rushing to India and a communal carnage in which about a million lives were lost.

[33] See Chronology (of events) in Ebrahim, *Soul of a Nation*, *supra* note 12 at 659-662, 663; Siri Gloppen, *South Africa: The Battle over the Constitution* (Dartmouth: Ashgate, 1997) at 6.

[34] In tune with its "divide and rule" policy the British government first introduced "communal electorates" for Muslims in 1909 and thereafter extended it to Sikhs, Indian Christians, Europeans and Anglo-Indians. In simple terms under this system, Muslims would elect Muslims only, and so on. See Chandra, *supra* note 4 at 290; Austin, *supra* note at 5.

[35] See *e.g.* Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at 310.

[36] See Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000) 53-55. [Klug, *Globalism and South Africa*]

Africa's discriminatory treatment towards Indians that first internationalized the issue.[37] Within the next forty years "the growing international human rights standards characterized apartheid as a crime and certain aspects of it as genocide," vindicated the struggle of those opposing it and condemned and ostracized those who practiced it until at last the invidious system collapsed under its own weight.[38]

Drawn up at a time when the modern international human rights movement was in its embryonic stage, there were no *coercive* - as opposed to inspirational - international influences over the Indian Constitution's content.[39] Rather, far from reflecting any powerful international influence, the Indian Constitution, has arguably, in some respects, contributed to the development of international human rights law.[40]

Two developments in international law that have impacted South Africa's reconstruction and are quite dramatic - when compared to the international situation in the early 1940s when India was asserting its right to self-determination - are the emergence of the right to democratic governance in international law[41] and the globalization of constitutionalism.[42] Assertions of the right to self-determination and the right to free political expression gave rise to practices of international election monitoring which in turn contributed to the emergence of a right to democratic governance.[43]

Furthermore, constitutionalism received a thrust in the post-World War II period with the wide adoption of written constitutions incorporating bills of rights in European states and the rapid expansion of the regional human rights system.[44] In 1982, the Western Contact Group (on Namibia) adopted the 'Constitutional Principles' to guide both the process for

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37 *Ibid.* at 52.
38 *Ibid.* at 137 (quoting Nelson Mandela).
39 However, this is not to suggest that the Indian constitution was made in total isolation.
40 See *infra* section 5 – conclusion.
41 See Klug, *Globalism and South Africa, supra* note 36 at 56-58; See generally Thomas Franck, "The Emerging Right to Democratic Governance" (1992) 86 Am. J. Int'l L. 46; Gregory Fox & Philip Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000); Gregory Fox, "The Right to Political Participation in International Law" in Gregory Fox & Brad Roth eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000) 48-90.
42 See Klug, *Globalism and South Africa, supra* note 36 at 60-62.
43 *Ibid.* at 57. See Gregory Fox, "The Right to Political Participation in International Law" in Fox & Brad Roth, *supra* note 41, 48 at 56.
44 *Ibid.* at 64; See Arnold J. Zurcher, *Constitutions and Constitutional Trends since World War II* (Connecticut: Greenwood Press, 1975) 2-3.

creating and the final content of a new constitution for Namibia.[45] This contributed to the development of the notion of an internationally scripted constitutional framework to guide the negotiations of local conflicts and constitution-making bodies.[46] Constitutionalism received yet another fillip with the democratization processes that the demise of Soviet Union unleashed.[47] Finally, a significant development that was directly tied to the South African reconstruction process was the World Bank's 1989 conclusion that unless the rule of law and good governance were injected into the African political culture, there was no hope of reversing Africa's economic mess.[48] These developments constitute the milestones in the globalization of constitutionalism and the backdrop against which South Africa's constitutionalism story unfolded.

Finally, as stated earlier, South African leaders also looked to and drew from the Indian experience for crafting remedies for common problems.[49] The foregoing demonstrates that constitution-making in India and South Africa differs in many respects while being similar in others and is thus an ideal situation for a coherent comparative analysis.

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[45] *Ibid.* See *e.g.* M. Wiechers, "Namibia: The 1982 Constitutional Principles and their Legal Significance" in D. van Wyk, *supra* note 10, 1 at 1. (The 1982 Constitutional Principles developed by the Western Contact Group on Namibia included both a process for constitution-making through a democratic election and the creation of a Constituent Assembly and a set of principles to guide the Constituent Assembly in its formulation of the Constitution.).

[46] *Ibid.* See generally Gro Nystuen, *Achieving Peace or Protecting Human Rights? Conflicts Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Leiden: Martinus Nijhoff Publishers, 2005) (critically examining the international involvement in the creation of the Bosnian constitutional order in 1995).

[47] *Ibid.* at 61.

[48] *Ibid.* at 65. The salient features of the World Bank's Rule of Law program were access to justice and rights protection. *Ibid.*

[49] See *supra* note 15 and accompanying text.

Part 2

2.1. Standard Setting: The Universal Declaration of Human Rights (UDHR)

While the Magna Carta, the French Declaration des droits de l'homme et du citoyen of 1789 and the United States Bill of Rights of 1791 are, by far, considered to be the most celebrated bills of rights, the UDHR,[50] with its emphasis on dignity, is of more recent vintage and has acquired a venerable status in the post-World War II era.[51] Heralding the onset of the modern human rights movement, the UDHR was designed to serve as a model for national constitutions and thereby to strengthen the domestic implementation of human rights.[52] It charted a bold new course for human rights by drawing a link between freedom and social security and by underscoring the inter-relatedness of both to peace.[53]

Although some viewed the adoption of the Universal Declaration to be the first step towards ushering a just and equitable order, the Cold War - which unleashed a "distorting" effect on the decolonization process and the development of human rights - had already begun brewing by the time Declaration was passed.[54] While India played a positive role in the Declaration's creation, apartheid South Africa did not vote for it given this historical text's potential to create legal liability in international law.[55]

Recent scholarship on the UDHR has shed considerable light on its origins, its "inclusive" drafting process and dispelled many myths in this regard.[56] Drawing from these sources, I

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[50] See generally Wiktor Osiatynski, "Are Human Rights Universal in an Age of Terrorism" in Richard A. Wilson, ed. *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005).

[51] See generally Philip Alston, *Protecting Human Rights through Bills of Rights* (Oxford: Oxford Clarendon Press, 1999); Georg Nolte, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005).

[52] Louis Henkin, "A Post-Cold War Human Rights Agenda" (1994) 19 Yale J. Int'l L. 249, at 249. More than thirty constitutions which have come into being either contemporaneously or later have been substantially influenced by the Declaration.

[53] See Glendon, *supra* note 13 at 238. (quoting U.S. President Harry Truman: "Experience has shown how deeply the seeds of war are planted by economic rivalry and social injustice.") *Ibid.*

[54] Shelley Wright, *International Human Rights, Decolonisation and Globalisation* (London: Routledge, 2001) at 20.

[55] *Ibid.* The voting tally for the UDHR was as follows: forty-eight countries voted for it, none against and eight countries abstained. *Ibid*

[56] See *e.g.* Johannes Morsink, *The Universal Declaration of Human Rights – Origin, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999); Glendon, *supra* note 3; Susan Waltz, "Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights" (2000) 23 Hum. Rts. Q 44. [Waltz, "Universalizing Human Rights"].

have constructed a brief narrative on how India contributed to the sculpting of the Universal Declaration. And it is to this interesting account that this writer now turns.

2.2. Sculpting of the Universal Declaration

A. India's Membership in the United Nations[57] (UN)

By the fall of 1944, although the Second World War was still on, signs of peace and the contours of the UN were beginning to emerge in sharp clarity[58] and in the subcontinent, events were rapidly unfolding in the direction of India's independence.[59] The British government announced that once the hostilities ceased, it was eager to see the effective and immediate participation of Indian leaders representing the major communities in the counsels of their country, of the Commonwealth and the UN.[60] Thus, in April 1945 India was invited to the conference in San Francisco where the UN Charter was drawn up.[61]

The Allied Powers were the key actors in scripting the UN parchment. However, it is heartening that thanks to the efforts of smaller countries including India, human rights had a greater presence in the UN Charter.[62] Although the smaller states made forceful pleas for drawing up a binding human rights covenant as compared to a mere declaration of rights, their desires were choked off by both the United States and the Soviet Union, both of which disfavored a binding covenant.[63]

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[57] India is a founding member of the United Nations [UN] being one of the 50 nations that signed the UN Charter in September 1945. See History of the UN, online: < www.un.org http://www.un.org/aboutun/history.htm >.

[58] See Glendon, *supra* note 13 at 4.

[59] Indeed, as the war clouds were gathering over the horizon, India's nationalist struggle had entered its final phase. Gandhi's civil disobedience campaign of 1942 ("Quit India Movement") had been a tremendous success and a war weary Britain with its grip over India considerably diminished had come round to the idea of Indians drafting a constitution for themselves through an elected Constituent Assembly. See Chandra, *supra* note 4 at 458, 483.

[60] See Rao, *supra* note 11 at 37. (referring to the "Cripps Proposals" made by Sir Stafford Cripps, then Lord Privy Seal on behalf of the British government).

[61] See Glendon, *supra* note 13 at 245, n. 24 (The invitees included all those countries that had declared or would declare war on Germany & Japan by March 1, 1945); Shiva Rao, *supra* note 11 at 27, 63. In 1939, the British Government had without consulting Indians made India a party to the war. As the war drew to a close the British Prime Minister, Winston Churchill had called for fresh elections and Clement Attlee, the Labour Party leader, had pledged granting independence for India in his party's election manifesto. *Ibid.* Pledging her firm support to the UN, then a fledgling world body, India came to take her rightful place as its member on October 30, 1945. See UN Membership, online: <http://www.un.org/aboutun/history.htm>.

[62] See Glendon, *supra* note 13 at 17-18.

[63] *Ibid.* at 17. Furthermore, India along with two other smaller states proposed a treaty against genocide at this conference. *Ibid.* at 19.

B. India & the Sculpting of the UDHR

a. Table 1: Simultaneous Exercises: Sculpting of the UDHR & Fundamental Rights in Indian Constitution

Table 1 below demonstrates that the framing of the Fundamental Rights Chapter in the Indian Constitution and the UDHR were simultaneous events.

Table 1: A BRIEF DRAFTING HISTORY OF
FUNDAMENTAL RIGHTS IN THE INDIAN CONSTITUTION AND THE UDHR

Date/ Period	Fundamental Rights Chapter	UDHR
Dec. 1946	Establishment of the Constituent Assembly (CA) & election of the Advisory Committee on minorities, fundamental rights.	
Jan. 1947		Creation of the Commission on Human Rights Stage 1: First Session of the Commission
Feb. 1947	Constitution of 5 sub-committees & the first meeting of Sub-Committee on Fundamental Rights	
April 1947	Fundamental Rights Sub-committee submits its final report to the Chairman of the Advisory Committee on April 16, 1947.	Stage 2: The appointment of the 8-nation Drafting Committee
May 1947	The Constituent Assembly discusses the Advisory Committee's report and recommendations on human rights	
Dec. 1947		Stage 3: Second Session of the Full Commission: This session produced the Geneva Draft
Feb. 1948	The Constitutional Adviser prepares a draft embodying the decisions of the Constituent Assembly. The Constituent Assembly's Drafting Committee considers this Report and prepares a revised Draft of the fundamental rights and publishes it.	
May 1948		Stage 4: The Commission's 8-member drafting committee meets for its second session
June 1948	Draft fundamental rights provisions are discussed in the Constituent Assembly	Stage 5: Third Session of the Commission – Discussions were intense and were over cutting down the size of the bulky draft that came out of the Second Session.
Sept. – Dec. 1948		Meetings of the Third Committee of the General Assembly – scrutiny of the entire document.
Nov. – Dec. 1948	Draft fundamental rights provisions are discussed in the Constituent Assembly.	Debate in the Plenary Session of the 3rd General Assembly & adoption of the UDHR
August - Oct. 1949	The Drafting Committee scrutinizes the provisions as passed by the CA and incorporates the changes in the revised Draft Constitution.	
Nov. 1949	The CA discusses, deliberates, and adopts the revised Draft Constitution.	

The UN Economic and Social Council created the Commission on Human Rights and explicitly tasked it with writing an international bill of rights.[64] While the entire two-year process (January 1947 – December 1948) of sculpting the UDHR was an inclusive one and stretched to seven stages,[65] the drafting process can be broadly divided into two main stages: drafting (January 1947- December 1948) and debating (Fall 1948).[66]

b. UDHR's Drafting: Stages at which India Participated

Interestingly, unbeknownst to many, India was among the 18 nations that constituted the first Human Rights Commission.[67] At the second stage of the Declaration's drafting process, an eight-nation drafting committee was constituted to complete the actual task of drafting the document.[68] The third stage (December 1947) consisted of the Second Session of the full Commission which met in Geneva and produced and considered what became known as the "Geneva Draft" of the UDHR.[69] By that time, one year had already passed since the drafting of the Indian Constitution had begun. Fourteen countries, including India, submitted their responses[70] on the Geneva Draft which the Commission duly noted.[71] Furthermore, during this time, any country (both from and outside the Commission) was free to submit its own draft and India was one of those countries that did so.[72]

As Charles Malik,[73] later pointed out "the present Universal Declaration had been drafted on a firm international basis" and reflected the numerous proposals made by governments including that of India's.[74] In addition, all countries were invited to submit their own drafts of a bill and nine countries including India submitted their proposals.[75] Morsink writes, "in

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[64] *Ibid.* at 4. The UN Charter skirted the issue of an international bill of rights and simply mandated the establishment of a Commission on Human Rights. *Ibid.* at 3.
[65] *Ibid.*
[66] See Waltz, "Universalizing Human Rights", *supra* note 56, 44 at 49. By this time elections to India's Constituent Assembly had been completed.
[67] See Morsink, *supra* note 56 at 4.
[68] *Ibid.* at 9
[69] *Ibid.* at 9-10.
[70] *Ibid.* at 10.
[71] *Ibid.*
[72] *Ibid.* India's submission can be found in UN Document: E/CN.4/11. *Ibid.* at 341, n.23.
[73] The Lebanese scholarly delegate
[74] See Morsink, *supra* note 56 at 10.
[75] *Ibid.*

more than one case, [these countries] found their suggestions hotly debated and incorporated in the final bill."[76]

By the time the fifth stage in the drafting process had arrived - which extended to the middle of June 1948 - what the members had before them was an overly bulky draft of the UDHR.[77] Following a series of joint proposals emanating from India and the United Kingdom, all the articles in this version were trimmed to their bare minimum.[78] At the sixth stage, that is, in fall 1948, the completed draft was referred to the UN General Assembly's Third Committee for a thorough scrutiny and formal debate by accredited delegations.[79] December 1948 constituted the last phase in the drafting process. At this stage, the modified draft UDHR was referred to a plenary session of the UN General Assembly where it was debated and the grand finale arrived when it was adopted on December 10, 1948.[80] The above narrative illustrates that India provided its input during the creation of the UDHR at virtually all of its drafting stages.

c. Members of the Indian Delegation

The Indian delegation at the UDHR's drafting process included Dr. Hansa Mehta,[81] Mr. M. Masani, Mr. Mahboob Mamdani, Mrs. Lakshmi Menon, Mr. Mohammed Habib, Mr. Appadorai, and Dr. B. N. Rau.[82] The first three persons in this list were members of the Constituent Assembly and the last person, Dr. B.N.Rau was the Constitutional Advisor to the Constituent Assembly.[83] Morsink's detailed account of the drafting process captures the active contribution the Indian delegation (including these individuals) made to discussions on the full gamut of rights under consideration.[84] Besides, proposing additions and changes to the draft text of the UDHR, the Indian delegation actively challenged and commented on proposals and proposed changes put forth by other foreign delegates.[85] Moreover, in some

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76 *Ibid.*
77 *Ibid.* at 11. The fourth stage of the UDHR drafting process occurred in May 1948 and most of this time was devoted to discussing the Covenant. *Ibid.* at 10.
78 *Ibid.*
79 *Ibid.* at 15.
80 *Ibid.*
81 Dr. (Mrs.) Hansa Mehta was a Gandhian political activist and social worker.
82 See generally Morsink, *supra* note 56.
83 For a list of India's Constituent Assembly members see Rao, *supra* note 11 at 102.
84 See generally Morsink, *supra* note 56.
85 *Ibid.* at 201.

instances, Indian members - given their induction into relevant sub-committees - were tasked with drafting specific articles in the UDHR.[86] All this is not surprising since as the account below and Table 2 reveal, Indians were no latecomers to the disquisition on human rights.[87]

d. A Step Back into History: The Rocky Road to Constitutional Liberties in India[88]

Indians did not have a charter of enforceable rights under the colonial constitutional structure and their successive demands for the same were spurned by the British.[89] Interestingly, a demand for freedom from economic exploitation and political liberties were the two strands of the nationalist movement that were woven together in the eloquent expressions for rights during this time.[90] For example, the *Constitution of India Bill of 1895* that mirrors some of the earliest and explicit aspirations of Indians listed the right to free and compulsory education - an important socio-economic right - alongside important civil and political rights.[91] The next milestone on the road to freedoms was the Commonwealth of India Bill of 1925 which contained, - in addition to the rights previously demanded, - the following two rights: freedom of conscience and the free profession and practice of religion and equality of the sexes.[92] This bill was a precursor of many fundamental rights and one of the Directive Principles in free India's Constitution.[93]

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[86] See *e.g. Ibid.* at 107. See also David Weissbrodt & Matthew Hallendorff, "Travaux Préparatoires of the Fair Trial Provisions - Articles 8 to11 - of the Universal Declaration of Human Rights" (1999) 21 Hum. Rts. Q. 1061.

[87] See *infra* Table 2 demonstrating the convergence between rights in the UDHR and the provisions of the Indian Constitution.

[88] Appreciating India's overall active role in the drafting of the UDHR and its ardent support for some issues requires a quick peep into her colonial past and at the milestones in her own struggle for securing basic human rights from the British.

[89] There were only the stray statutory safeguards that could be stripped off with utter ease by the British Parliament or the Indian Legislature. See Rao, *supra* note 11 at 171. For instance the Government of India Act, 1935 forbade discrimination on the grounds of religion, place of birth, descent, colour or any of them with regard holding any office under the Crown by a subject of His Majesty. *Ibid.*

[90] Dadabhai Naoriji and R.C. Dutt, two 19th century intellectuals who were some of India's earliest nationalist leaders provided the first economic critique of colonialism. See Chandra, *supra* note 4 at 93-95.

[91] See *Constitution of India Bill, 1895* reprinted in Shiva Rao, *The Framing of India's Constitution: Select Documents* vol. 1 (New Delhi: The Indian Institute of Public Administration, 1966) at 5-14 [Shiva Rao, *Select Documents*]. This bill also records for the first time the influence of the U.S. Constitution on the thinking of India's nationalist leaders during the early stages of their struggle. *Ibid.* at 5.

[92] *Ibid.* at Rao, *Select Documents supra* note 91, 43 at 44.

[93] See India Const. Parts III & IV.

The rights enumerated in subsequent constitutional proposals mirrored the rights of the Commonwealth of India Bill and those expressed in the post-war European constitutions.[94] However, the prevalence of forced or bonded labour in some parts of India gave rise to certain special clauses like that of: 'no breach of contract of service or abetment thereof shall be made a criminal offence."[95]

The Congress' Karachi Resolution of 1931 that holds a special place in the history of rights in India spelt out that "political freedom must include real economic freedom of the starving millions."[96] Besides enumerating basic civil rights articulated in previous demands, it promised "substantial reduction in rent and revenue, exemption from rent in case of uneconomic holdings, relief of agricultural indebtedness, better conditions for workers including a living wage, limited hours of work and protection for women workers and state ownership or control of mines, key industries, and means of transport."[97]

As independence loomed on the horizon, the Muslim League stepped up its demands for a separate Muslim state.[98] As a result - as the Sapru Report demonstrates - national unity and minorities' protection became the dominant concerns of nationalist India:

> The fundamental rights [of the new constitution] will be a standing warning to all that what the constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the

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[94] See *Nehru Report, August 1928*, reprinted in Rao, *Select Documents supra* note 91, 58 at 60; Austin, *supra* note 11 at 55.

[95] See *Nehru Report, August 1928* reprinted in Rao, *Select Documents supra* note 91, 58 at 60. With ten of these rights finding place in Part III and three other rights appearing in Part IV of the Indian constitution, the rights in the Nehru Report were clearly a close precursor of the Fundamental Rights of the Indian Constitution.

[96] See Chandra, *supra* note 4 at 284.

[97] *Ibid.* at 284-85.

[98] See Percival Spear, *The Oxford History of Modern India 1740-1975* (New Delhi: Oxford University Press, 2002) at 363. Syed Ahmed Khan, the "acknowledged grand old man of Indian Islam" began the revival of the Muslim community in India. He advocated the theme that "Muslims of India *were a separate people or nation* who must not be absorbed with Hindus." He saw in the formation of the INC in 1885 a future dominance of Hindus and advised Muslims to keep away from it and contributed to founding the Muslim League in 1906. *Ibid.* at 358-63.

> freedom of religion, worship, and the pursuit of the ordinary applications of life.[99]

e. Sculpting of the UDHR: Issues for which India Actively Campaigned

It is no wonder then that the Indian delegation actively campaigned for the following issues during the drafting of the Declaration:

(i) Anti-discrimination Norm

The inclusion of clear anti-discrimination language in the UDHR can be traced to the persistence of the communist delegation.[100] Not surprisingly, India weighed in strongly with the communists in expanding the grounds of discrimination in Article 2.[101] Interestingly, the plight of the colonized peoples, the gross injustices meted out to Indians in South Africa and the rampant discriminatory practices against Negroes in the United States of America frequently cropped up as examples of glaring discrimination around the world.[102]

Initially, the article on non-discrimination did not proscribe discrimination on the basis of color since it was broadly understood that the term race included color.[103] However, it was Mr. M. Masani, who proposed the inclusion of the world "color" reasoning that "race and color were two conceptions that did not necessarily cover one another."[104] And Dr. Hansa Mehta seconded her compatriot's proposal.[105] Happily, this term ultimately found its way into Article 2 of the UDHR.[106] Next, although "political belief" did not occur in the

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[99] While the above demands for express fundamental rights constituted nationalist India's efforts *at constitution-making*, the Sapru Report was the first important constitutional proposal dwelling on fundamental rights that emanated from Indians after the British government had accepted their demands for a Constituent Assembly in 1945. See *Constitutional Proposals of the Sapru Committee, December 1945* reprinted in Rao, *Select Documents supra* note 91 at 151.

[100] Morsink, *supra* note 56 at 93. Indeed, as Morsink writes: "this non-discrimination stamp was their mark on the document." *Ibid.*

[101] *Ibid.* at 95.

[102] *Ibid.* at 93, 94

[103] *Ibid.* at 102

[104] *Ibid.* at 102.

[105] *Ibid.*

[106] *Ibid.* Article 2 reads as follows:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, language, religion or political or other opinion, national or social origin, property, birth or other status.

nondiscrimination lists of many constitutions then extant, a proposal to proscribe discrimination on this basis also emanated from the Indian delegation.[107]

(ii) Socio-economic Rights and Ending Colonialism

As can be recalled, India's nationalist leaders viewed human rights to be indivisible and interconnected[108] and as many of the INC resolutions reflect, socialist philosophy held a powerful sway on many prominent leaders including Nehru and Gandhi and, in fact, imbued the nationalist movement as a whole.[109] It is this vision that the Indian delegation brought with it to its task across the Atlantic.

As Morsink points out, if the Universal Declaration today trumpets the right to food, clothing, shelter, and medical care as well as social security, education, and decent working conditions the reason is that the "great majority of its drafters" shared a holistic view of human rights with socio-economic rights enjoying not second class but equal status in their "kingdom of human rights."[110] In particular, besides Sir John Humphrey's own socialist leanings, the socio-economic rights in the UDHR owe their origin to the Latin American socialist constitutions and to the powerful lobbying by the Latin American delegation and the strong assists that this delegation received from former colonies including India.[111]

As a random example of the oral exchange, on the draft text of Articles 23 and 24, the Indian and U.K. delegations jointly submitted a proposal: "Everyone has the right to work under just and favorable conditions."[112] Ms. Mehta argued for collapsing the right to work and the conditions for it in one article on the basis that "if each individual has the right to work, it was logical that someone had the obligation to guarantee that he had work."[113] The

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[107] *Ibid.* at 109.
[108] See text accompanying *supra* notes 90-91.
[109] See *e.g. supra* notes 96-97 and accompanying text (discussing the content of the INC's Karachi Resolution); Chandra, *supra* note 4 at 526-527.
[110] See Morsink, *supra* note 56 at 191.
[111] *Ibid* at xiv, 157. Sir John Humphrey was the Director of the UN Secretariat's Division on Human Rights. *Ibid.* at 5.
[112] *Ibid* at 164.
[113] *Ibid.*

Indian delegation along with other small state delegations also fought hard to promote decolonization and the right to self-determination.[114]

(iii) Gender Equality

"All human beings are born free and equal in dignity" proclaims the UDHR. This inspiring and non-sexist phrase owes its place in the document to a "determined (Indian) woman" Mrs. Hansa Mehta, who found John Humphrey's initial, gendered phrase: "all men are created equal" to be "out of date" and strongly objected to it.[115] Although Mrs. Roosevelt found Prof. Humphrey's gendered phrase acceptable, Mehta and the UN Commission on the Status of Women continued to press for its removal until the end.[116] Finally, although her inspiring phrase slipped into the final draft text by a sheer clerical error none can deny that the UDHR would have been tainted with sexist language but for Mehta's dogged perseverance.[117]

f. Table 2: Convergence of Rights in the UDHR & the Indian Constitution

In the table below one finds a convergence in the provisions of the Indian Constitution and the UDHR with most of the thirty rights recognized in the UDHR reflected in the Indian Constitution either as fundamental rights or as Directive Principles.

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[114] See Waltz, "Universalizing Human Rights", *supra* note 56, 44 at 65.
[115] See Morsink, *supra* note 56 at 118; Waltz, "Universalizing Human Rights", *supra* note 56, 44 at 63. Mrs. Mehta's ardor for women's rights echoed even in the Chambers of India's Constituent Assembly. See *infra* note 272 and accompanying text.
[116] *Ibid.*
[117] *Ibid.*

Table 2: RIGHTS CONTAINED IN THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948 AND THE INDIAN CONSTITUTION, 1950

NAME OF RIGHT	UNIVERSAL DECLARATION OF HUMAN RIGHTS	THE INDIAN CONSTITUTION
Right to Equality	Article 7	Article 14
Freedom from non-discrimination	Article 7(2)	Article 15 (1)
Right to equal access to public service in the country	Article 21 (2)	Article 16 (1)
Freedom of opinion and expression	Article 19	Article 19 (1) (a)
Right to assemble peacefully & freedom of association	Article 20 (1)	Article 19 (1) (b)
Right to form and to join trade unions	Article 23 (4)	Article 19 (1) (c)
Right to freedom of movement and residence within the borders of each state	Article 13 (1)	Article 19 (1) (d)
Freedom from retroactive laws	Article 11 (2)	Article 20 (1)
Freedom from arbitrary arrest and detention	Article 9	Article 21
Freedom from slavery or servitude & prohibition of slavery and the slave trade in all forms	Article 4	Article 23
Freedom of thought, conscience and religion	Article 18	Article 25 (1)
Cultural Rights	Article 22	Article 29 (1)
Right to life and liberty	Article 3	Article 21
Right to equal pay for equal work	Article 23 (2)	Article 39 (d) (Directive Principle)
Protection for Motherhood & Childhood	Article 25(2)	Article 42 (Directive Principle)
State's Responsibility to provide for just and humane conditions of work & for maternity relief	Article 23 (1)	Article 42 (Directive Principle)

Chapter 2

2.3 Constitution-making in India: The Final Stage in a Historic Freedom Struggle and the First Hour of Freedom

India's constitution-making moment crested her nationalist wave that had gathered momentum in the aftermath of World War II and surged ahead with irresistible force sweeping away the tottering columns of imperial might. The key to understanding constitution-making in India lies in deciphering what *Swaraj* (freedom) meant for Indians, the unique nature of their protracted freedom struggle and the character of the colonial state against which they were pitted.

A. The Unique Nature & Goals of India's Freedom Struggle

As mentioned earlier, India's colonial masters had first arrived as traders[118] and by 1858 almost the whole of India[119] had slid under the umbrella of Britain's "paramountcy." [120] Thereafter, she came to be "governed by and in the name of Her Majesty, the Queen of England."[121] Although establishing "self-governing" institutions in India was Britain's avowed goal, what was intentionally erected and sustained until the last day of the British rule was a form of benevolent "despotism" with a pinch of parliamentarism "controlled from Home (England)."[122] What this offered at best, (that too, only in the final stage) - was a consultative status for Indians — in the governance of their nation.[123]

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[118] See text of *supra* note 17 and accompanying text.

[119] "British India" refers to the states that were initially under the control of the East India Company and later came under the suzerainty of the British Crown. The terms "native states" or "Princely States" refers to those states or provinces that though an integral part of the British Empire remained under the nominal control of the Princes and were subject to the overall supervision of the British Crown through the "English Resident Officers."

[120] See Spear, *supra* note 98 at 21.

[121] *Ibid.* at Mahajan, *supra* note 17 at 266 (quoting from the Government of India Act, 1858).

[122] See Chandra *supra* note 4 at 22.

> All experience teaches us that where a dominant race rules another, the mildest form of government is *despotism.* [emphasis added] *Ibid.* at 113. [quoting the Secretary of State Charles Wood, while moving the Indian Council Bill of 1861].

The colonial columns in India were not pulverized by a single revolutionary stroke. Indeed, "reserves of counter-hegemony" slowly and steadily chipped away at these columns until their final topple became inevitable and was foreseeable.[124] Variously semi-authoritarian though based on the rule by law (not rule of law) and an oppressive system sharply inimical to civil liberties, the colonial state – and the cramped constitutional space it offered - helped shape a nationalist struggle that successfully utilized both mass law-breaking civil-disobedience campaigns and constitutionalist campaigns.[125] As can be gleaned from nationalist India's demands, achieving political independence and freedom from economic exploitation were the two interwoven strands of the freedom struggle.[126]

Opposed to the introduction and development of parliamentary government as being unsuitable to India's conditions, John Morley, the Secretary of State had in 1908 candidly admitted:

> If I were attempting to set up a parliamentary system in India, or if it could be said that this set of reforms [Minto-Morley Reforms] led directly or necessarily up to the establishment of a parliamentary system in India, I for one would have nothing to do all with it....

Almost a decade later, the post-World War I policy of the British as announced by Montague, the Secretary of State in 1917 in the House of Commons had changed to:

> Increasing the association of Indians in every branch of administration and the gradual development of *self-governing institutions* with a view to progressive realization of *responsible government* in India as an integral part of the British Empire....

See Rao, *supra* note 11 at 5. [emphasis added].

[123] See generally V.D. Mahajan, *Legal and Constitutional History of India* (New Delhi: S. Chand & Co. Ltd. 1966).

The three major constitutional reforms made by the British were embodied in the *Government of India Act, 1909, Government of India Act, 1919* (providing a limited field of responsibility for and devolution of power to Indians at the provincial level) & *Government of India Act, 1935* (installing an impure form of parliamentary (federal) government comprising a bicameral federal legislature with restricted powers and subordinate to the British Parliament, an irresponsible and unaccountable executive consisting of the (Governor-General) and the members of his executive council drawn from the federal legislature and a federal court). Under the 1935 colonial constitutional framework the provinces were granted a new constitutional autonomy and their administration was to be carried out by the Governor and his popular ministers who were drawn from among members of the provincial legislatures and were responsible to it. Elections to these provincial legislatures were held in December 1945. But given the provincial Governor's awesome discretionary, the avowed concept of autonomy was diluted reducing the responsible provincial governments to a farce. A Federal Court - the precursor of free India's Supreme Court - from whom all appeals lay to the Privy Council in England until 1949 - with limited powers of judicial review of governmental action was created at the Centre. Since the inauguration of the federation rested on the integration of a specified number of princely states, princely non-cooperation resulted in "the stillbirth of the federal legislature and executive and (the consequent) continuance of its irresponsible predecessor." Thus until the end, colonial India had an irresponsible and unaccountable executive and in whose council, a few Indians were inducted, that too, only in the final days. *Ibid.* at B-177.

[124] See Chandra, *supra* note 4 at 13.

[125] *Ibid.* at 13-14. For a brief period of twenty-eight months, the INC held partial power under the colonial constitutional dispensation erected under the Government of India Act, 1935. It formed ministries in six provinces and later held office in two more provinces. *Ibid.* at 322-323; See also text of *supra* note 125.

[126] See *supra* notes 89-99 and accompanying text.

Pitted against a racist colonizing power, nineteenth century India birthed an array of intellectuals who through their radical critique of the values and practices of their own civilization and that of Western society spurred a rich social and religious reform movement.[127] This movement coupled with Mahatma Gandhi's relentless campaigns for emancipating women and eradicating the practice of "untouchability" (a form of caste-based slavery) were integral features of India's freedom struggle.[128]

Although there were "were many other streams flowing into the swelling river of India's freedom struggle"[129] the INC birthed in 1885 came to embody the national movement.[130] Since the nationalist movement was from its inception conceived as an anti-imperialist struggle and woven around this common unifying theme, the INC attracted to its ranks men and women of all castes and creeds, young and old, rich and poor, the intellectuals and the masses.[131] In short, it stitched together India's diverse and scattered groups and in the process galvanized national unity.[132] Moreover, being a movement, it witnessed through its entire course, the entry and exit of individuals and groups of various political hues and divergent ideological perspectives (including communists, socialists, leftists and rightists) and varying degrees of political militancy (moderates and extremists).[133]

From its inception, the INC remained wedded to Hindu-Muslim unity. It therefore never appealed to parochial tendencies and inveighed against the colonizer's divisive policies and its bestowal of benefits on these narrow considerations.[134] However, - for several reasons that are beyond the scope of this thesis - a majority of Muslims perceived the INC as a predominantly Hindu organization, shied away from it and conflated the success of the

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[127] See Satish Saberwal, "Introduction: Civilization, Constitution, Democracy" in Zoya Hassan, ed. *India's Living Constitution* (New Delhi: Permanent Black, 2002) 1 at 10; Chandra *supra* note 4 at 82-90.

[128] See Chandra *supra* note 4 at 232-233 & 527.

[129] *Ibid.* at 27.

[130] *Ibid.* at 79. Although birthed as a political party, it soon morphed into a movement, and a mass and a largely peaceful one at that with the entry of Mahatma Gandhi on the political stage - in the mid-1920s. *Ibid.* at 170.

[131] *Ibid.* at 28.

[132] *Ibid.*

[133] *Ibid;* See also Austin, *supra* note 11 at 11.

[134] *Ibid.* For instance, the British government conceded to the Muslim leaders' demands for a separate and communal electorate for Muslims in 1909. For the meaning of communal electorates see text of *supra* note 34. For a discussion of the communal electorate under the Government of India Act, 1909 see Rao, *Select Documents supra* note 11 at 4.

nationalist movement with the predominance of Hindus in a future constitutional set up.[135] Britain's divide and rule policy further fuelled this lingering suspicion of Muslims and fanned the growth of communalism in the country.[136]

As independence loomed on the horizon, preventing the dismemberment of the nation and protecting the rights of minorities received top priority. For instance, the Sapru Report of 1945 declared that "the fundamental rights of the new constitution will be a 'standing warning' to all

> that what the Constitution demands and expects is perfect equality between one section of the Community and another in the matter of political and civil rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life.[137]

B. The Creation, Character & Composition of the Constituent Assembly

It was only in 1945 that the British government yielded to nationalist India's long expressed demand for sculpting its constitution through a Constituent Assembly elected on the basis of universal adult franchise.[138] However, since time was of the essence and its grip over the nation was fast slipping, the British government jettisoned the INC's demand for elections on the basis of adult franchise. Instead it proposed using the recently elected provincial legislatures to serve as electoral bodies for the Assembly.[139] Thus the provincial legislatures provide a window to the composition and texture of the Assembly as a body. Therefore, a few words about them are needed.

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135 See Spear, *supra* note 98 at 362. See also text of *supra* note 96.

136 See Chandra, *supra* note 4 at 282.

137 See *Constitutional Proposals of the Sapru Committee, December 1945,* reprinted in Rao, *Select Documents supra* note 91 at 155-56; See also *The Nehru Report,* reprinted in Rao, *Select Documents supra* note 91 at 58-75.

138 See *e.g.* Congress Resolution on the White Paper and the Communal Award, June 1934 reprinted in Rao, *Select Documents supra* note 91 at 77-79; Congress Resolution on the Government of India Act, 1935 reprinted in Rao, *Select Documents supra* note 91 at 80; *Congress Resolution on the Demand for a Constituent Assembly and Withdrawal of the 1935 Constitution,* reprinted in Rao, *Select Documents supra* note 91 at 84. [Hereinafter the terms "Constituent Assembly" and "Assembly" shall be used interchangeably].

139 See text of *supra* note 123; Rao, *supra* note 11 at 64. The Constituent Assembly came to be created under the Cabinet Mission Plan of 1945. *Ibid.* Hereinafter the terms "Cabinet Mission Plan" and "Plan" will be used interchangeably.

Created under the colonial constitutional (federal) dispensation of 1935[140] elections to these bodies (1,585 provincial assembly seats) were held in December 1945 on the basis of the separate and communal electorates, then extant.[141] According to the Plan, these legislatures, which were to serve as the Assembly's Electoral College were expected to elect one person for every 1,000,000 people.[142] However, for the purpose of elections to the Assembly, the Plan restricted the use of the communal and separate electorate principle by recognizing only three major communal groups: General (Hindus and all other communities),[143] Muslims, and Sikhs.[144]

The Princely States were allotted 93 seats in the Assembly, leaving them to hammer out with the Assembly the method of selecting their delegations, and the provinces were assigned 296 seats in total.[145] In elections to the Assembly held in July 1946, out of a total number of 296 seats,[146] the INC received 208 seats of which 203 delegates were drawn from the General Category, 4 were Muslims and 1 was a Sikh.[147] Thus, upon its creation the Assembly comprised in total 389 indirectly elected members.[148]

Could these provincial legislatures initially elected on the basis of the communal electorate have produced a representative Constituent Assembly? Technically speaking, the answer is no. According to Prof. Austin who has mined the Indian National Archives, roughly 28.5 per cent of the adult population of the provinces were eligible to vote in the provincial

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140 For a brief description of the colonial constitutional set up under the Government of India Act, 1935 see text of *supra* note 123.

141 See Austin, *supra* note 11 at 9. While the INC had captured 925 or 85 per cent of the non-Muslim seats in those elections, the Muslim League collared most of the Muslim seats in all the provinces and all the Muslim seats in some provinces. Members of these three groupings in the provincial assemblies then voted for this pre-fixed number of delegates assigned to them *Ibid.*

142 See Rao, *supra* note 11 at 68. [Hereinafter the terms Cabinet Mission and Mission shall be used interchangeably].

143 *Ibid.* All other communities would comprise Anglo-Indians, Indian Christians, Parsis, Jews, and the Harijans or untouchables.

144 See Austin, *supra* note 11 at 5. The total population of a given province or state was divided into these three groupings and each grouping was allotted - according to its percentage of the province's population, - its proportion of the provincial delegation to the Assembly. *Ibid.*

145 *Ibid.* For a definition of 'princely states' see text of *supra* note 119.

146 Total Number of seats: 389. Princely States: 93, Provinces: 296 – Congress 208; 5 small non-congress groups: 16 and Muslim League: 72 seats. See Austin, *supra* note 11 at 9.

147 See Rao, *supra* note 11 at 96.

148 *Ibid.* See also Austin, *supra* note 11 at 10. At the time of the Assembly's creation, the Congress held 69% of the Assembly's seats and this figure spiked to 82 per cent when the Assembly fractured upon partition in 1947 and lost the Muslim League members. *Ibid.*

assembly elections of early 1946.[149] A restricted franchise with tax, property, and educational qualifications had denied the masses (including peasants, small traders and countless others) voting rights.[150]

Following the announcement of the Mission Plan, a key problem that remained unresolved by the British was to devise a way of bringing both the Muslim League and the INC into the proposed Assembly. Formation of an interim government at the Centre comprising representatives of the Muslim League and the INC remained another irritant.[151] While the initial consent of the Muslim League and INC led to the formation of the Assembly,[152] echoes of the idea of a separate state for Muslims now rent the air and delayed the Assembly's convening.[153] Brushing aside the Muslim League's boycott, the British government set December 1946 as the date for the Assembly's first meeting and by April 1947, three sessions of the Assembly had been held without the Muslim League's participation.[154] As the political and communal situation grew turbulent, the British government decided that partition of the country was inevitable.[155]

Having epitomized India's nationalist movement, it is not surprising that the INC emerged as the dominant political force in the Assembly. Furthermore, the interim governmental framework (both provincial and national) following independence was imbued with the INC element, for the INC had formed the government too.[156]

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[149] See Austin, *supra* note 11 at 10.

[150] *Ibid.*

[151] Unable to coax the Muslim League to join the interim government, the Viceroy unilaterally proposed the formation of an Executive Council comprising fourteen members (not including the Viceroy). Finally, the Viceroy, invited Jawaharlal Nehru, the President of the INC to form the provisional government and thus the new Executive Council comprising wholly of Congress members took office on September 2, 1946. Rao, *supra* note 11 at 74.

[152] Although elections to the Assembly were completed by July 1946, the constituent body remained to be convened.

[153] See Rao, *supra* note 11 at 73. In 1940 the Muslim League demanded a separate Muslim state for the first time. Thereafter in 1945 it reiterated this demand, withdrew its acceptance to join the Assembly and called upon the Muslims in India to respond to a programme of "direct action." What ensued were bloody communal riots in Calcutta in August 1946. *Ibid.*

[154] Rao, *supra* note 11 at 76-79.

[155] *Ibid.* at 91. As a result of the partition, the membership of the Constituent Assembly fell from 389 members to 299 members.

[156] For the formation of the Interim government see text of *supra* note 151.

Viewed against the above electoral figures and given the dominance of one political party, namely, the INC - India's constitution-making process can easily be characterized as being at its core a wholly homogenized one-party dominated venture. However, that the INC was a mass-political party composed of diverse and disparate elements that operated along democratic lines both in its internal functioning as well as on the floor of the assembly belies this characterization.[157] As Jawaharlal Nehru, wrote:

> The Congress has within its fold many groups, widely differing in their viewpoints and ideologies. This is natural and inevitable if the Congress is to be the mirror of the nation.[158]

a. Representative Element

Although according to the Cabinet Mission, only Muslims and Sikhs were guaranteed seats in the Assembly, the INC ensured that Parsis, Anglo-Indians, Indian Christians, Harijans, and women were elected on the INC ticket to the Assembly.[159] Furthermore, it is a tribute to the visionary men in INC that they also inducted non-Congress talent into the Assembly by having individuals with expertise and knowledge and practical experience in administration, law, and constitutional law.[160] Indeed, as one Assembly member put it, "there was hardly any shade of political opinion not represented in the Assembly."[161] Although the Assembly was bereft of members from three political organizations: the Communist Party, the Socialist Party and the Hindu Mahasabha,[162] this did not rob the Assembly of its all-India character.[163] Moreover, most members of the Assembly were politically and emotionally committed to treading the socialist path after independence.[164]

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157 See Austin, *supra* note 11 at 10-25.
158 *Ibid.*
159 See Austin, *supra* note 11 at 12. For a complete list of the Assembly members see Shiva Rao, *supra* note 11 at 102-106. Nine of the Assembly members were women. *Ibid.*
160 See Austin, *supra* note 11 at 13.
161 *Ibid.* at 12, 13. [quoting K. Santhanam, a prominent Constituent Assembly member).
162 The Muslim League, the Hindu Mahasabha after 1937 and the Rashtriya Swayamsevak Sangh (RSS) displayed extreme or fascistic communalism. See Chandra *supra* note 4 at 400.
163 See Austin, *supra* note 11 at 15.
164 *Ibid.* at 41-43.

b. Participatory Element

No referendum was held either before or after the Indian Constitution was enacted. But a participatory element was imbued in the early stages of the constitution-making process when Dr. B. N. Rau,[165] the Constitutional Advisor, prepared and circulated a questionnaire on the salient features of the proposed constitution among all the members of the Central and Provincial Legislatures.[166] His memorandum embodying the opinions elicited through this process and his own ideas on the main principles that should govern the formulation of the constitution[167] served as a template in drafting the constitution.[168]

As noted earlier, at the time of its birth, the Assembly was only a constituent power that met with the permission of the British government. What was its status? Was it a sovereign body? And what was its authority in the light of the absence of Muslims - a large chunk of the population - given the Muslim League's withdrawal? Answers to these questions can be found in the rules of procedure that the Assembly itself wrote wherein it conferred on itself a sovereign status and disallowed its dissolution "except by a resolution assented to by at least two-thirds of the whole number of its members."[169] Within eight months of the Assembly's creation, India emerged independent and the Assembly doubled up as India's parliament. In short, it acquired a legal status that it had assumed on its inception.[170]

Although constituent assemblies that were created in the wake of revolutions sped up their constitution-writing tasks,[171] India's Assembly accomplished its task in three years, (December 1946 – November 1949)[172] when it formally adopted the Indian Constitution on November 26, 1949. Thus, with its national parchment finally drawn up by a body

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165 See B. N. Rau, *India's Constitution in the Making* (Calcutta: Orient Longmans Private Ltd., 1960) at 14 & 16-41 (containing a reprint of the questionnaire). [Rau, *"India's Constitution in the Making"*]

166 See Rao, *supra* note 11 at 111-112.

167 *Ibid.*

168 *Ibid.*

169 See Austin, *supra* note 11 at 7 (quoting the Constituent Assembly).

170 See Rao, *supra* note 11 at 91.

171 See Patrick Fafard & Darrel R. Reed, *Constituent Assemblies: A Comparative Survey* (Ontario: Institute of Intergovernmental Relations, 1991) at 24.

172 Two logical reasons can be proffered for this. First, besides constitution-making, the Assembly had to attend to other pressing tasks of governance. Secondly, because it filled the constitutional void created by Britain's withdrawal from India, there was arguably no urgency to rush its constitution-making endeavour.

composed exclusively of Indians, allowing no foreign authority any voice, nationalist India's dream of shaping its own political and economic destiny remained not illusory but a reality.

Part 3 Constitution-making in South Africa

3.1 Participatory Constitution-making: Its Genesis

Traditionally, constitution-making has been an elitist process dominated by political elites and legal experts and has taken to be an "act of completion."[173] The US Constitution that was drawn up in 1787 by a "hand-picked elite group" and the Indian constitution that was drawn up by an elected constituent body dominated by elites of a single political party are apt examples of constitutions forged by this traditional constitution-making process.[174]

However, this elitist trend has been shifting as the decade of the 1990s witnessed the birth of "participatory constitutionalism" - a new and innovative form of democratic constitution-making in many countries including South Africa.[175] These inclusive constitutive processes are rooted in the belief that constitutions are about people and therefore, unless they are involved in their making, and accept them as their own, they will be tainted with illegitimacy.[176] Furthermore, this line of thinking theorizes a direct relationship between the form of constitution-making and its final content.[177] Understanding the factors that spurred the evolution of participatory constitution-making in Africa necessitates taking a brief though critical look at Africa's overall painful historical and bleak constitutional past.

A. Colonial Legacy

The three evils of slavery, colonialism and apartheid together destroyed Africa's pre-colonial traditional social and political organizations, arbitrarily fractured united African communities, stunted the African agrarian economy and thereby rendered the African political soil inhospitable to human rights and constitutionalism.[178]

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173 Vivien Hart, *Democratic Constitution Making* (Washington, DC: US Institute of Peace, 2001) at 2.
174 *Ibid.*
175 *Ibid.*
176 *Ibid.*; Julius Ihonvbere, "Discussion Chair" in Mihaela Serban Rosen, *Constitutionalism in Transition: Africa and Eastern Europe* (Warsaw: Helsinki Foundation for Human Rights, 2003) 93, at 105.
177 *Ibid.* at 99.
178 See John Hatchard *et al.*, *Comparative Constitutionalism and Good Governance in the Commonwealth*, (Cambridge: Cambridge University Press, 2004) at 7.

B. Constitutions without Constitutionalism: The First Two Generations of Constitution-making in Africa

The constitution-making processes during the first wave of decolonization in Africa were top-down, co-opted and opportunistic processes marked by limited consultation with the local elites and without broad public participation.[179] The resultant liberal "independence constitutions" did not mirror the aspirations of the African peoples but simply erected the Westminster model (though with a bill of rights) on the African political soil long left seared by the organizationally elitist colonial rule.[180] Furthermore, as Prof. Shivji points out, what received an exalted status in these new constitutions - at the behest of the wily departing colonial power - was the right to property and not social justice provisions.[181] Clearly, the safety of the colonial power's overall economic and strategic interests provided the impetus for this preferred constitutional choice.[182] The governments that these constitutions birthed were undemocratic and they soon "re-made" these constitutions to stamp out legitimate dissent, squelch civil liberties and perpetuate their rule.[183] The African economic decline, widespread abysmal poverty and a political landscape littered with constitutions but without constitutionalism"[184] were the unhappy results.[185]

Unfortunately, the second wave of constitutive process that occurred at the peak of the cold war and brought forth "the second-generation" (or "post-colonial") constitutions was no different.[186] How were these constitutions made? And what were their characteristic features? Sucked into the global arms race and pre-occupied by their locally driven rush to accumulate international capital African political elites were driven by the "instrumentalist law" and the "developmentalist state" philosophy[187] made popular by Western powers and

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179 *Ibid.* at 14-15.
180 *Ibid.*
181 See Issa G. Shivji, "Three Generations of Constitutions and Constitution-Making in Africa: An Overview and Assessment in Social and Economic Context," in Rosen, *supra* note 176 at 75.
182 *Ibid.*
183 See Hatchard, *supra* note 178 at 15.
184 See H.W.O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox," in Greenberg, *supra* note 26 at 65.
185 See Hatchard, *supra* note 178 at 15.
186 See Shivji, "Three Generations of Constitutions and Constitution-Making in Africa: An Overview and Assessment in Social and Economic Context," in Rosen, *supra* note 176 at 76.
187 *Ibid.* at 76.

international financial institutions.[188] These constitutions typically enshrined authoritarian presidential systems of government, weak judiciaries that kowtowed to the authoritarian executive, equally emaciated legislatures and etatized all forms of civil society organizations.[189] Sadly, although African countries had become free in the 1960s, in the two decades that followed they had jeopardized their sovereignty internationally[190] and nationally their legitimacy was in question.[191] These bleak events provide both the backdrop for and the causes that animated the birth of participatory constitution-making.

C. A Theory of Constitution-making: Participatory Constitution-making & "Third Generation" Constitutions

The upside of these successive corrupt, rapacious and illegitimate constitutional regimes was that they sparked wide-spread internal resistance, human rights debates, and democratization movements in Africa.[192] All this spurred new and engaging constitutional talk contesting the traditional paradigms of constitution-making, the advocacy of participatory formulation of rights, and the potential of constitutions in accelerating social transformation, empowering women and civil society and addressing pressing socio-economic issues hitherto widely neglected.[193] This new constitutionalism discourse resonated in the "people's power" movement in South Africa in the late eighties.[194] While the thrust of constitutionalism - in liberal political discourse – is to limit the power of the rulers and to protect individual rights, the new African discourse on constitutionalism sought to "recast" constitutional issues within a different conceptual framework and guided by a new democratic perspective.[195]

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188 *Ibid.* at 78

189 *Ibid.* at 76-77.

190 By the late eighties, Africa was on its knees, swamped by its international debt-burden. *Ibid* at 81.

191 *Ibid.* at 81.

192 *Ibid.* at 84.

193 See Marek Nowicki, "Foreword" in Rosen, *supra* note 176 at vii; Julius Ihonvbere, "Constitutions without Constitutionalism? Towards a New Doctrine of Democratization in Africa?" in John Mukum Mbaku & Julius O. Ihonvbere eds., *The Transition to Democratic Governance in Africa: The Continuing Struggle* (Westport: Praeger, 2003) 137 at 139; Albie Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990).

194 Heinz Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 137; Ebrahim, *Soul of a Nation, supra* note 12 at 143.

195 See Julius Ivonbhere, "Constitutions Without Constitutionalism? Towards a New Doctrine of Democratization in Africa?" in Mbaku & Ihonvbere *supra* note 193 at 144 (quoting Issa Shivji).

All this paved the way for the "third generation" constitutions and more importantly, the African innovation of "participatory constitution-making" with its slant toward legitimacy and not legality in numerous countries including Uganda, Eritrea, Benin, Rwanda, South Africa, Zimbabwe and Kenya.[196] Several constitutional reconstruction strategies ranging from constitutional amendments of existing constitutions preceded by public debates, to constitutional commissions mandated to receive input from a wide cross-section of people and constitutional review commissions with specific mandates to slow-paced constitutional reforms were deployed.[197] According to Prof. Shivji, it was the National Sovereign Conference "that was literally born in the streets of Africa as a culmination of street protests and demonstrations" and which was thrust upon the ruling parties that was the most innovative method and which bears a distinct African stamp.[198]

While participatory constitution-making is widely acknowledged to contribute to a constitution's legitimacy, the Zimbabwean experience however reminds us that it can be misused or used as a charade by elites.[199] However, none can deny that this new form of democratic constitution-making has come to stay.

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196 See Hart, *supra* note 173 at 7; Shivji, "Three Generations of Constitutions and Constitution-Making in Africa: An Overview and Assessment in Social and Economic Context," in Rosen, *supra* note 176 at 81.

197 See Julius Ivonbhere, "Constitutions Without Constitutionalism? Towards a New Doctrine of Democratization in Africa?" in Mbaku & Ihonvbere *supra* note 193 at 145.

198 See Shivji, Three Generations of Constitutions and Constitution-Making in Africa: An Overview and Assessment in Social and Economic Context," in Rosen, *supra* note 176 at 85. The National Sovereign Conference, which was empowered to appoint a Constitutional Commission was first adopted in Benin. Thereafter this practice was followed in Mali, Niger, Gabon and Togo with varying degrees of success. *Ibid.*

199 See Hart, *supra* note 173 at 12. Although the Constitutional Commission of Zimbabwe was tasked with the responsibility of producing a draft constitution with the fullest public participation, it instead came to be manipulated by President Robert Mugabe's party and therefore the draft constitution did not reflect the people's views and it was therefore ultimately rejected in a public referendum. *Ibid.*

3.2. Constitution-Making in South Africa: A Bridge to a New Constitutional Dawn?

A. The Evil of Apartheid

The post-apartheid 1996 South African Constitution belongs to the "third generation" of constitutions discussed above.[200] The story of its making is in fact the story of the rebirth of South Africa, from the ashes of apartheid, as a new democratic and racially undivided nation.[201] Prior to the 1996 Constitution, South Africa had three constitutions in 1910, 1961, and 1983.[202]

The utterly racist constitutional regime existing under these constitutions explains why a new constitution was thought necessary or desirable. What the Afrikaner white minority regime erected in South Africa was the apartheid system (a system of racial separateness) with a slant on power, propped up by deeply discriminatory laws and a massive repression of rights.[203] This system ignored the multi-ethnic, multi-lingual, and multi-cultural nature of South African society. Stripped of their basic human rights, compelled to lead a segregated existence in all spheres of their lives and thereby denied access to amenities, institutions, and opportunities, politically disenfranchised, dispossessed of their lands and citizenship, the black South Africans were reduced to being slaves in their motherland.[204]

Born in 1912 to confront apartheid the African National Congress (ANC) evolved into the most influential and dominant liberation group in the anti-apartheid struggle.[205] Akin to the

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[200] See *supra* note 196 and accompanying text.

[201] See generally Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Boston: Little Brown, 1995)

[202] See Ebrahim, *Soul of a Nation, supra* note 12 at 4, 8-9 & 18. See also Jeremy Sarkin, "The Drafting of South Africa's Final Constitution from a Human Rights Perspective" (1999) 47 Am. J. of Comp. L. 67 at 67. ["South Africa's Final Constitution"]

[203] See Ebrahim, *Soul of a Nation, supra* note 12 at 13-14; 8-19; Sarkin, "South Africa's Final Constitution" *supra* note 202, 67 at 67; Richard Spitz & Matthew Chaskalson, *Politics of Transition - A Hidden History of South Africa's Negotiated Settlement* (Hart Publishing, 2000) at 4-8.

[204] See Sarkin, "South Africa's Final Constitution", *supra* note 202 at 67; Spitz & Chaskalson, *supra* note 203 at 4-8.

[205] See Ebrahim, *Soul of a Nation, supra* note 12 at 11.

INC, it was pro-poor and had been historically committed to recognising women's rights.[206] The National Party (NP) stamped out all opposition to its apartheid policies through draconian laws and emergency regulations.[207] Packing the courts with men sympathetic to its apartheid policies, the NP choked off the blacks' hopes of using the courts to dismantle the apartheid structure.[208] In 1960, the ANC was banned and its key leaders including Nelson Mandela were locked up in prison for life.[209] Thereafter, the ANC had no choice but to go underground.[210]

However, the dramatically transformed international political climate of the late 1980s beamed rays of hope on South Africa's dark constitutional landscape. Nelson Mandela's release in 1990, a consequence of the gathering international pressure on South Africa signalled a new constitutional dawn in the offing.[211]

It is relevant to ask here, what forms of constitution-making had the South Africans all along considered and what options for constitution-making were available to them at that time? The ANC's long asserted right of South Africa's black majority to self-determination implied that it was open to the people of South Africa to opt for any political system, including a one-party state or state socialism or any other system that prevailed during the Cold War.[212] The ANC had envisaged a constitution written by a democratically-elected Constituent Assembly.[213] However, recognizing the advantages in opting for an internationally acceptable framework, as that established for Namibia, the ANC strove to have its set of constitutional principles – which it had adopted in 1988 – receive international blessing.[214] Heinz Klug rightly argues that the post-Cold War era's political culture that was "increasingly

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206 David Pottie & Shireen Hassim, "The Politics of Institutional Design in the South African Transition" in Sunil Bastian & Robin Luckham, eds., *Can Democracy be Designed? : The Politics of Institutional Choice in Conflict-torn Societies* (London: Zed Books, 2003) 60 at 62.
207 See Spitz & Chaskalson, *supra* note 203 at 4-6.
208 *Ibid.* at 6.
209 *Ibid.* at 7-8.
210 *Ibid.*
211 Ebrahim, *Soul of a Nation supra* note 12 at 30, 37.
212 Heinz Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 132.
213 See Ebrahim, *Soul of a Nation, supra* note 12 at 58; Heinz Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 136.
214 Heinz Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 137; See the Harare Declaration reprinted in Ebrahim, *Soul of a Nation, supra* note 12 at 451-455.

dominated by a consolidating conception of democratic constitutionalism," shaped and reinforced particular political options in South Africa's constitution-making process.[215]

B. The Two Stages of Constitution-Making

Broadly speaking, the South African constitution-making process took place in two stages, with the first stage stretching from February 1990 to April 1994 when the Interim Constitution came into force. During the first stage, key agreements on process were negotiated and forged by the warring parties in private and public sessions.[216] The anxieties of the white minority, that they would lose their leverage and be smothered by the new constitutional dispensation, and the fears of the long-oppressed majority (that apartheid would never be dismantled) were the major obstacles from the start. The second stage spanned from 1994 to 1996 when the final constitution was adopted. However, patience and perseverance on the part of the negotiating parties helped smooth the bumps and a way out was finally devised.

Rejecting the idea of an outright transmission of power from the old order to the new, the parties agreed to a transition in two stages.[217] The Multi-Party Negotiating Process (MPNP), an unelected forum, drafted an interim constitution that included 34 basic constitutional principles to which the parties had agreed would be binding on the final constitution and that the constitutional text would have to be certified as being in consonance with these principles by the constitutional court.[218] These principles shaped both the process and the content of the new constitution.[219] The existing government or the *pouvoir constitute* adopted the interim constitution which resulted *inter alia* in the immediate establishment of a constitutional court and a bill of rights.[220] The interim constitution included a "sunset

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215 Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 132.
216 Ebrahim, *Soul of a Nation*, *supra* note 12 at 43-73
217 See Spitz & Chaskalson, *supra* note 203 at 3.
218 See Ebrahim, *Soul of a Nation*, *supra* note 12 at 150-154 & 619 (reproducing the constitutional principles); Spitz & Chaskalson, *supra* note 203 at 3, 41; S. Afr. Const. 1993, Schedule 4, arts. I-XXXIV.
219 The constitutional principles related to the form of the national government, the relationship between the national and sub-national, minorities' interests, human rights, public-sector organizations and amendment procedures.
220 See Spitz & Chaskalson, *supra* note 203 at 3.

clause" that entrenched a system of power sharing for five years after the first democratic election.[221]

While public participation at this stage was indirect and several different groups vying to influence the MPNP process staged mass demonstrations and submitted petitions, successful multi-party strategies of women's groups led to the recognition of gender equality and the provision of a Commission on Gender Equality in the Interim Constitution.[222]

C. Participatory Constitution-Making

In 1994, the first ever free, non-racial elections were held to select a new parliament in South Africa, which doubled up as the Constitutional Assembly tasked with framing a new constitution within a stipulated period.[223] It was at this stage that the South African constitution-makers chose to give the public a direct role in constitution-making.

The Constitutional Assembly's fundamental task was to produce a constitution that was legitimate, inclusive, durable, and accessible through a credible and transparent process.[224] Besides complying with the pre-determined constitutional principles, the constitution's legitimacy also hinged on the credibility of the drafting process, public's accessibility to the process and finally the constitution's acceptance by the public.[225] Incorporating the views of all "role-players" in a draft text through a public participation programme, [226] publication of this draft text to elicit further views from the public and negotiation and adoption of the constitution comprised the three phases of this process.[227]

To ensure transparency, the meetings of the Constitutional Assembly were open to the public and all its materials were disseminated to the public through the internet.[228] Serving as the bridge between the public and the Constitutional Assembly, "Theme Committees"

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[221] See Spitz & Chaskalson, *supra* note 203 at 31; Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 141.
[222] Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 141-142.
[223] See Ebrahim, *Soul of a Nation*, *supra* note 12 at 177; Hart, *supra* note 173 at 12 (stating that approximately, 87 per cent of the population voted).
[224] See Ebrahim, *Soul of a Nation*, *supra* note 12 at 177, 179-180.
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid.*
[228] *Ibid.* at 190 & 246-247.

soaked up public opinion on diverse issues by collating and processing public petitions and attending national hearings organized by various sectors of civil society and then channelled the same to the Constitutional Assembly.[229]

The task of engaging a country of 40 million with a dominantly rural and illiterate population in a public dialogue on profound constitutional issues and the long absence of a constitutionalism culture in the country made practicing participatory constitution-making a daunting challenge.[230] To overcome these obstacles, a massive media, education and advertising campaign was launched to spread constitutional awareness, stimulate interest in the ongoing constitution making process and to invite the public and interest groups to make submissions.[231] Advertisements blaring 'You've made your mark, now you have your say' and 'Its your right to decide your constitutional rights' slathered on television, radio, in local newspapers, and on outdoor billboards, reminded South Africans of the importance of the on-going constitution-making process to their lives and those of future generations and of the consequent need for their serious participation in it.[232]

Although a national survey exposed a public that was sceptical about the participatory component of the constitution-making process and about the seriousness with which its submissions would be received, the Constitutional Assembly nonetheless received 250,000 million submissions, a bulk of which were petitions rather than submissions.[233] While the public used petitions to address issues ranging from animal rights, sexual orientation, abortion, pornography, the death penalty and the seat of Parliament, just over 11,000 petitions were substantive in nature setting out peoples' wish lists.[234]

Public participation was invited even at the certification stage by allowing any body or person wishing to object in the course of the certification hearings to submit its views to the Constitutional Court. Although it first declined to approve the 1996 constitution on the ground that it did not adhere to the binding constitutional principles included in the interim

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229 *Ibid.* at 182
230 *Ibid.* at 241.
231 *Ibid.* at 194. More than 4.5 million copies of the draft constitution were distributed throughout the country.
232 *Ibid.* at 243.
233 *Ibid.*
234 *Ibid.*

constitution,[235] the Court eventually certified the constitution when it was submitted with the necessary amendments.[236] In a final step marking the public's "ownership" of the constitution, 7 million copies of the Constitution were distributed amongst the general populace.[237]

3.3. SUMMING UP

Dr. Upendra Baxi asserts that while comparing countries' constitutional experiences one must focus on a "host of contexts."[238] He reminds us that, "much of the business of 'modern constitutionalism' was transacted during the early halcyon days of colonialism/imperialism."[239] And indeed, although historically, the Constituent Assembly – a body elected directly by the people and tasked specifically with writing a constitution and enjoying political and constitutional legitimacy - is the heritage of the liberal constitutionalist tradition,[240] Great Britain, a liberal democracy besides holding a nation in bondage, also denied a large section of its people an opportunity to participate directly in designing their political and constitutional future. Thus came to be created for India, a constitution-making process that was not participatory but an elitist one. But neither was India's constitution-making process a top-down and/or a co-opted one akin to those discussed earlier, which characterized the rushed African decolonization.

As has been shown, although the British created and convened India's Constituent Assembly, it was ultimately an unfettered body. Although the constitution as a whole

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[235] *Ibid.* at 232-235. The Constitutional Court's certification judgment identified the following nine elements of the new text which failed to comply with certain constitutional principles: 1) The right to engage in collective bargaining on employers' associations but not on individual employers (Section 23); 2) the amendment of the constitution by a two-thirds majority of the National Assembly (Section 74); 3) the removal of Public Protector and the Auditor General (Section 194); 4) The framework of the Public Service Commission which did not set out its functions and powers (Section 196); 5) The local government's power to raise excise taxes (Section 229(1)); 6) Section 241(1) which did not incorporate the provisions of the Labour Relations Act in the Constitution; 7) power to raise excise taxes vested in the local government (Chapter 7) ; 8) Clause 22(1)(b) of Schedule 6 which placed the Truth and Reconciliation Act beyond constitutional scrutiny and 9) powers an functions vested in the provinces which were substantially inferior to those which the provinces enjoyed under the Interim Constitution. See Spitz & Chaskalson, *supra* note 203 at 425-427.

[236] *Ibid.*

[237] *Ibid.* at 249

[238] Baxi, "Constitutionalism" *supra* note 5, 1183 at 1184

[239] *Ibid.*

[240] See Edward McWhinney, *Constitution-making: Principles, Process and Practice* (Toronto: University of Toronto Press, 1981) at 33.

reflected the ideology and concerns of the influential members in the Assembly,[241] their presence did not prevent serious differences or sharp and free exchanges on several issues among the members.[242] In fact, all contentious issues were papered over after a transparent and democratically conducted debate.[243] Although the Constituent Assembly was indirectly elected on a limited franchise this neither deprived it of its "highly representative" character[244] nor dimmed its vision in creating an inclusive social democracy based on justice and equality. These factors have lent legitimacy to the Indian Constitution.

Both India's and South Africa's[245] constitution-making processes unleashed a range of claims for the recognition of specific social identities and interests. Many Indian Muslim leaders both within and outside the Constituent Assembly sought for retaining the personal laws. Some even argued for retaining the communal electorate. An Untouchable who had suffered untold miseries at the hands of caste Hindus, no one knew better about their plight than Dr. B. R. Ambedkar, the Chairman of the Drafting Committee.[246] Having championed their cause during the freedom struggle, he now used his influential position in the Assembly to campaign actively for entrenching affirmative action for Untouchables in the constitution.[247] These observations confirm Daniel Elazar's argument that constitution-making is "pre-eminently a political act."[248]

A key distinction between the Indian and South African processes that is tied to the role of 'constitutional principles' in a constitutive process is that while Indians were creating a society and polity solely by and for themselves and in which their colonial masters would be

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241 See Austin, *supra* note 11 at 22; See also Rajeev Dhawan's comment that "[A]n influential member of the 'inner group' *spoke for virtually the entire Assembly*" when he asserted that in light of the communal violence engulfing the nation, public order, security and safety could legitimately be made the grounds for limiting *all of the* fundamental rights. See Rajeev Dhawan, "India" in Lawrence W. Beer, *Constitutionalism in Asia: Asian Views of the American Influence* (Berkeley: University of California Press, 1979) 373 at 378. (emphasis added).

242 See Austin, *supra* note 11 at 22.

243 *Ibid.* at 21-22.

244 *See* Austin, *supra* note 11 at 14.

245 See Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 129.

246 Dr. B. R. Ambedkar took his Ph.D in economics from Columbia University, United States and was admitted to the Gray's Inn, England.

247 See Austin, *supra* note 11 at 19-20.

248 Daniel J. Elazar, "Constitution-making: The Pre-eminently Political Act" in Keith Banting & Richard Simeon, *The Politics of Constitutional Change in Industrial Nations* (Toronto: University of Toronto Press) 232 at 233.

physically and psychologically absent, the black South Africans were sculpting a new constitution to reconfigure their society and polity not exclusively for themselves but as one in which they would have to coexist – though this time as equals and on equal terms - with their past oppressors.[249] In short, the presence of two mutually distrusting groups in the constitutional negotiations in South Africa made the use of constitutional principles - as a tool for assuring all involved that the end product would mirror their mutually agreed upon vision – almost inevitable. South Africa's example indicates that besides, placing a check on the politics of constitution-making, constitutional principles also have the potential to foster reconciliation and make the process more inclusive. However, there is also a clear tension between constitutional principles and democracy in that they are - as the South African process demonstrates - principles formulated by the political elites primarily to place a substantive limit on constitution-making which is essentially a political process and therefore counter-majoritarian.

A comparison of the Indian and the South African constitution-making processes captures the dramatically different forms international interactions between constitution-makers and foreign experts have assumed and the changing perceptions among indigenous constitution-makers about the role and advice of foreign advisors in the period following World War II. Dr. B.N. Rau, the Constitutional Advisor to India's Constituent Assembly, traveled to the United States, Canada, Eire and England to discuss the framing of the constitution with jurists and statesmen.[250] In the United States, the Supreme Court Justice Felix Frankfurter advised Rau of the dangers inherent in the due process clause and therefore, on his return to

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[249] See *e.g.* S. Afr. Const. Preamble:

> We the people of South Africa,
> *Recognize the injustices of the past,*
> ...
> Believe that South Africa *belongs to all who live in it,* united in our diversity
> ...
>
> We therefore, through our freely elected representatives, adopt this Constitution, as the supreme law of the Republic, so as to
> *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.* [emphasis added].

[250] See Rau, *India's Constitution in the Making, supra* note 165 at xi, & 302.

India, Rau advised the Assembly members to drop the due process clause from the constitution.[251]

Compare this with the South African constitution-making process from which foreign experts were *formally excluded* during the second stage of the negotiations.[252] Prof. Bereket H. Selassie's blunt statement captures the reasons for the general resistance to foreign involvement in the constitution-making process: "In the 1950s, Europeans summoned African leaders from twenty-five to thirty countries to capitals like London, Paris, and Brussels and shoved constitutions down their throats."[253] The lingering memory of this illegitimate post-colonial constitution-making practice may well explain the South African ban on foreign advisors. However, I concur with some scholars who find the "correct" version of history - that South Africa's political transition was a 'local miracle' - problematic because it does not factor in the new, indirect and nuanced but pervasive modes of interaction in this age of globalization.[254] And indeed, as one scholar observed, the formal ban on the participation of foreign advisors in the South African constitution-making process ironically led to the "hearings" of foreigners being programmed into the Constitutional Assembly's programs, while the voices of local "experts" were silenced unless they worked for a political party.[255]

One of the vaunted benefits of participatory constitution-making is that it creates an opportunity for all social groups including women to press for their concerns and ensure that the constitution reflects their demands. Although a considerable number of women had daringly participated in India's freedom struggle and especially so, in Mahatma Gandhi's non-violent Satyagrahas and civil-disobedience campaigns, a very negligible portion of them came to participate in actual constitution-making. The total membership of India's Constituent Assembly stood at 299 of which only nine members were women. Nonetheless, the Indian Constitution has turned out to be a progressive constitution that guarantees

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251 *Ibid.* at 302-303. Justice Frankfurter advised Rau that the due process clause was undemocratic because it allowed a few judges to veto legislation enacted by the people's elected representatives and that it threw an "unfair" burden on the judiciary. *Ibid.* See also Austin, *supra* note 11 at 103.

252 Louis Acouin, "The Role of International Experts in Constitution-Making: Myth and Reality" (2004) 5 Law & Ethics 1 at 1. [emphasis added]

253 *Ibid.*

254 See Klug, *Globalism and South Africa, supra* note 36 at 69.

255 *Ibid.* at 70. (quoting Christina Murray, one of the constitutional advisors to the Constitutional Assembly).

universal adult franchise, equality before the law, equal protection of the laws and outlaws discrimination on the basis of sex as well as provides for affirmative action for women and disadvantaged groups. The gendering of India's constitution can thus be traced to the emancipatory goals of her freedom struggle.

In contrast, the participatory approach to constitution-making adopted in South Africa opened up new opportunities for women to make a direct contribution to the process and to influence the text. Furthermore, akin to the INC, the ANC has historically been gender sensitive and envisioned a non-sexist South Africa. As a result of the ANC's Women's League's demonstrations during the MPNP process, its demand for each of the two-member delegations at the negotiating process to consist compulsorily of one woman was accepted and South Africa became the first country in which a constitution-making body comprised an equal number of men and women.[256] This is not a small gain given that South African society is still "deeply sexist."[257]

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[256] See Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 136.
[257] *Ibid.* at 137.

Part 4

4. Constitutionalization of Human Rights in Comparative Perspective

4.1. Constitutional Supremacy and Judicial Review in India and South Africa: Two Divergent Paths to the same Constitutional Destinations

Daniel Elazar argues that the essence of constitution-making has to do with questions of constitutional choice. The vital questions to be asked in a study of constitution-making then are not just about "what is chosen but who does the choosing and how it is done."[258] Indian and South African constitution-makers traversed two divergent paths in arriving at the same destination of constitutional supremacy and judicial review. Having long jettisoned dictatorial forms of government, Indians had seen "in British officials their opponents but in British (representative) institutions their hope."[259] However, their demands for a written proclamation of court-policed rights attest to their unwillingness to conform to the Dicean view of rights.[260] Being long suspicious of their colonial masters' designs, they found in a written bill of rights tangible safeguards against oppression.[261] Furthermore, the presence of different religious groups spurred them to steer in the direction of juridical constitutionalism to both assuage minorities' fears of being trampled over by a Hindu majority and to disprove Britain's dubious claims in this regard.[262]

Unlike India, a reading of South Africa's constitutional history indicates an initial outright rejection of judicial review.[263] This unwillingness of South Africans to repose faith in judicial review even in their new constitutional order is understandable given the judiciary's

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258 Daniel J. Elazar, "Constitution-making: The Pre-eminently Political Act" in Banting & Simeon, *supra* note 248, 232 at 244.

259 See Spear, *supra* note 98 at 338.

260 See Nehru Report, 1928 reprinted in Rao, *Select Documents supra* note 91, 58 at 59-60; See Austin, *supra* note 11 at 171. In the Constituent Assembly, Dr. K.M. Munshi, Sri Alladi K. Iyer and Dr. B. R. Ambedkar, the Chairman of the Drafting Committee were votaries of judicial review. In their separate Memoranda, Alladi K. Iyer and K.M. Munshi emphasized that the Supreme Court must be explicitly vested with the power of judicial review. *Ibid.*

261 See Austin, *supra* note 11 at 54.

262 *Ibid.* at 54; See *supra* note 99 and accompanying text.

263 See Klug, *Globalism and South Africa, supra* note 36 at 29, 70. "With the adoption of the 'final' constitution, the history of constitutionalism in South Africa may be summarized as the rise and fall of parliamentary sovereignty." *Ibid.* at 30.

abetment in perpetuating the apartheid regime.[264] Although the ANC's *African Claims in South Africa* and the *Freedom Charter of 1955* (to name just two documents) illustrate its long advocacy of human rights and the black South Africans' aspirations for rights, the notion of a bill of rights in South Africa, arguably at least until 1987, conjured up the fearsome spectre of a mechanism that would perpetuate the white minority's privileges.[265]

According to Klug, the answers to South Africa's "dramatic constitutionalist turn" from parliamentary supremacy to judicial review are rooted not only in the dynamics of local developments but also in the globalized constitutionalism of the post-twentieth century.[266] Eventually, each of the parties, that is, the ANC and the NP saw in a justiciable constitution a viable mechanism to resolve their distinct concerns.[267] Furthermore, the World Bank's "rule of law" mantra to cure the ailing African economy coupled with South Africans' own aspirations to adhere to the internationally created normative framework so as to be welcomed by the international community were other factors that pushed its elites to make the preferred constitutional choices.[268]

4.2. India

A. Social Justice, Gender Equality and Affirmative Action

One fundamental way in which a constitution can forge national unity and aspire to be legitimate is to lay the foundations for an inclusive society by securing equal rights for all members, especially when some groups have long suffered historic injustices. India's constitution framers outlawed untouchability and made its practice a criminal offence.[269] However, allowing that exploitative practices,[270] including a deeply embedded socio-religious

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[264] *Ibid.*; Spitz & Chaskalson, *supra* note 203 at 6.

[265] See Klug, *Globalism and South Africa, supra* note 36 at 73-74.

[266] See *supra* notes 41-48 and accompanying text. By the time South Africa became free an American style-constitutionalism with a written constitutions and bill of rights were the signature features of the new international normative order.

[267] See Klug, *Globalism and South Africa, supra* note 36 at 76.

[268] *Ibid.* at 48.

[269] See India Const. Part III, Art. 17:

> "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

[270] *Ibid.* at Part III, Art. 23 (1) – Right against Exploitation:

one such as untouchability would not be easily uprooted unless the constitutional ban was extended to civil society, the constitution-makers decisively made even private conduct bow to this constitutional ethic.[271]

In the Assembly, Dr. (Mrs.) Hansa Mehta, reminded the members that what women's groups were demanding were not separate electorates, reservations, or privileges but social, economic, and political justice.[272] In carving out the scope and limits of freedom of religion and conscience, the framers were careful to ensure that religion would not become a pretext to perpetuate social evils like untouchability, *purdah* or *Sati*.[273] Accordingly, the state is not precluded from intervening in and regulating any economic, financial, political, or other secular activities associated with religious practice.[274] The Indian constitution-framers also explicitly made "social reform" another ground for limiting freedom of religion. Besides throwing open Hindu religious institutions of a public character to all classes and sections of Hindus, that is, including the so-called "untouchables"[275] they extended the principle of non-discrimination to citizens' use and access to publicly-funded wells, tanks, bathing *ghats*, roads and places of public resort.[276]

In tune with their progressive outlook, the framers conferred on all citizens the right to "equality before the law" and "the equal protection of the laws,"[277] explicitly outlawed discrimination on many grounds including sex (though not sexual orientation) and

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(1) Traffic in human beings and *begar* and other forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

271 Articles 17 and 23 are not addressed merely to the State. They are applicable to even relations within civil society. See *e.g. People's Union for Democratic Rights v Union of India,* AIR 1982 SC 1473 (declaring the freedom from exploitation is available against not just the state but the "whole world").

272 *Constituent Assembly Debates,* vol. 1 at 138.

273 Sati refers to the ancient Hindu custom where widows burnt themselves on the funeral pyres of their husbands.

274 See India Const. Art. 25 (2)

Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.

275 *Ibid.* at Art. 25 (2)

Nothing in this article shall affect the operation of any existing law or prevent the State from making any law –

(b) providing for social welfare and reform or the throwing open of Hindus religious institutions of a public character to all classes and sections of Hindus.

276 *Ibid.* at Art. 15 (2) - Prohibition of discrimination on grounds of religion, caste, sex or place of birth .

277 *Ibid.* at Art. 14

sanctioned affirmative action for the upliftment of women and children and for the advancement of Harijans (untouchables) and socially and educationally backward classes of citizens.[278] Finally, by constitutionally mandating quotas in the national and state legislatures in proportion to Harijans' population, they strengthened these historically downtrodden groups' right to political participation.[279]

B. Minorities' Rights - Cultural and Educational Rights

Despite India's partition on religious lines her nationalist leaders, in tune with their unwavering pledge of protecting the minorities[280] and creating a secular democracy wrote into their national parchment guarantees of equality of citizenship, freedom from discrimination, and religious liberty.[281] The British had used diabolical tools, such as the communal electorates and communal quotas or group rights in the form of reservations for representation in the legislature or public service, to divide the country. Although the framers by adopting universal adult franchise and jettisoning these reservations moved closer to a liberal framework, the question of addressing minorities' cultural rights nevertheless remained.

The framers granted minorities the right to preserve their languages, script, and culture, and to establish their own educational facilities.[282] In doing this, the framers were guided by the principle of enlightened accommodation of diverse faiths and religions. Therefore, the Indian Constitution promotes the idea of secularism and by implication proscribes the establishment of a theocratic state.[283]

However, one point of contention that arose in the constitution-making process was the right of religious minorities to be governed by their own personal laws. Although the framers rushed to divest Hindu religious beliefs and practices of some of their inhumane

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278 *Ibid.* at Art. 15(4).
279 *Ibid.* at Art. 330.
280 See *Constitutional Proposals of the Sapru Committee*, reprinted in Shiva Rao, *Select Documents, supra* note 91 at 151.
281 See India Const. Arts. 14-16 & 25-28.
282 *Ibid.* at Art. 29-30
283 Originally, the word "secular" did not occur in the Preamble to the Indian Constitution. It was inserted in the Preamble in 1976 by the Constitution (Forty-second Amendment) Act, 1976.

content such as untouchability or *Sati*, they however dithered when it came to the reform of non-Hindu religious traditions. Dr. Hansa Mehta and Mr. M. Masani argued that the existence of separate personal laws was hampering national unity and recommended that the provision of a uniform civil code be made a justiciable right.[284] However, deferring to the objections of Muslim leaders both inside and outside the Assembly, the framers compromised and decided to make this proposal a Directive Principle.[285] Therefore, as things stand today for personal matters like marriage, divorce, maintenance, adoption, and inheritance, there are different laws governing these aspects for different communities in India.[286]

C. Forging Transformative Constitutionalism

Yet another illustration of the Indian Constitution's normative character and social justice purpose can be found in Nehru's assertion in the Constituent Assembly that :

> The first task of this Assembly is to free India *through a new constitution, to feed the starving people, and to clothe the* naked masses and to give every Indian the fullest opportunity to develop himself according to his capacity.[287]

How did India's constitution-makers approach their task of constitution-making in their quest to build a substantive vision of social justice can be best seen in their approaches to carving property rights and the state's socio-economic obligations in the constitution. I will take up the right to property first.

a. Right to Property

Given the feudal complexion of the society and the complex nature of the agrarian structure in colonial India, India's nationalist leaders had long begun advocating and designing land

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[284] See Shiva Rao, *supra* note 11 at 325
[285] See India Const. Art. 44.
[286] See generally Flavia Agnes, *Law and Gender Inequality:The Politics of Women's Rights* (New Delhi: Oxford University Press, 1999).
[287] *Constituent Assembly Debates*, vol. 2, (1947) at 316-317 (emphasis added).

reform measures to ameliorate the plight of poor peasants.[288] Extending the state's power to deprive a person of his property in the name of social justice was an issue that they could not escape and therefore their debates in the Assembly veered around devising the type of constitutional protection that should be offered to the right to property that did not edit out their goal of achieving social justice.[289] Although, initially, the framers adopted the due process clause in its classic form,[290] on seeing the dangers due process would pose to "expropriatory legislation" they ultimately decided to deny due process protection to right to property.[291]

b. Directive Principles of State Policy

As can be recalled, India's leaders embraced a unified vision of human rights.[292] However, realizing that speeding the country's economic progress overnight would be well nigh impossible, they were compelled to make a distinction between judicially enforceable rights [Fundamental Rights] and positive socio-economic obligations of the State [Directive Principles of State Policy] in the constitution.[293] The two relevant precedents they had

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288 See Chandra, *supra* note 4 at 343-350. To assist peasants, the Congress ministries that had held power for 28 months under the 1935 colonial constitutional set up had introduced agrarian laws for debt relief, to restore lands lost during the great Depression of the 1930s and to ensure security of tenure to tenants. *Ibid.* at 345. See also discussion of Karachi Resolution in text accompanying *supra* notes 96-97.

289 See Austin, *supra* note 11 at 84-92; Shiva Rao, *supra* note 11 at 319-325.

290 The due process clause in its classic form can be found in the U.S. Constitution. See U.S. Const. V Amendment:

> *No person shall be* held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* [emphasis added]

291 See Austin, *supra* note 11 at 84-87.

292 See *supra* note 90 and accompanying text.

293 See Austin, *supra* note 11 at 50. The content of Part IV has expanded since the Constitution was first made. Initially, Part IV contained principles that gave directives such as securing for men and women equally the right to an adequate means of livelihood, equal pay for equal work for both men and women, protecting children and youth against exploitation and moral and material abandonment, providing public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want, providing just and humane conditions of work and maternity relief, and providing free and compulsory education for all children up to the age of fourteen years.

before them in this regard was the 1937 Constitution of Ireland and the "International Bill of Rights" published by the jurist Lauterpacht in 1945.[294]

Some members feared that the non-enforceability element of the Directive Principles would render them inefficacious.[295] Therefore, to ensure that social justice values were not ignored, the framers constitutionally designated the Directive Principles as being "fundamental in the governance of the country" and imposed a "duty" on the State "to apply these principles in making laws."[296] In short, they relied on the political process to provide the impetus for the fulfillment of the constitution's social promises.

These social promises include: securing for men and women equally the right to an adequate means of livelihood,[297] equal pay for equal work for both men and women,[298] and a living wage for workers.[299] While some of these principles are ideals[300] that the State ought to strive for, some others like the duty to provide free education for all children are goals that the State should achieve within a specified time period.[301] The emphasis on Panchayats[302] and the prohibition on alcohol consumption[303] have the Gandhian vision clearly stamped on them.

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294 See Shiva Rao, *supra* note 11 at 320. The Irish Constitution made a distinction between fundamental rights and the directive principles of state policy and the International Bill of Rights also made a distinction between the justiciable and the non-justiciable rights. *Ibid.* Although Dr. B.N. Rau had learned from his discussions in Ireland of a potential clash between the right to property and implementation of directive principles it is not clear why his recommendations were not considered by the Assembly. *Ibid.* at 327-328

295 *Ibid.* at 321. See also Paramjit Jaswal, *Directive Principles Jurisprudence and Socio-Economic Justice in India* (New Delhi: APH Publishing Corporation, 1996) at 72. [Jaswal, *Directive Principles Jurisprudence*]

296 See India Const. Art. 37

> The provisions contained in this Part (Part IV) shall not be enforceable by any court but the principles therein laid down are nevertheless *fundamental in the governance of the country* and it shall be the *duty* of the State to *apply these principles* in making laws. [emphasis added]

While the Directive Principles *guide* the exercise of legislative power they however do not *control* the same.

297 *Ibid.* at Art. Art. 39[a]]

298 *Ibid.* at Art. 39[d]

299 *Ibid.* at Art. 43. See generally Mary Beth Lipp, "Legislators' Obligation to Support a Living Wage: A Comparative Constitutional Vision of Social Justice" (2002) 75 Southern Cal. Rev. 475

300 See India Const. Art. 51 (duty to promote international peace and security and respect International law)

301 *Ibid.* at Art. 45 [prior to the Constitution 86th Amendment Act of 2002]. Since the enactment of the constitution certain other new Directive Principles such as providing free legal aid and participation of workers in management of industries have been added by constitutional amendments.

302 *Ibid.* at Art. 40 (development of village self-government)

303 *Ibid.* at Art. 47

4.3 Social Action Litigation and the Indian Supreme Court's Socio-Economic Jurisprudence

The story of constitutionalism and rights in India has unfolded in the form of a poignant three-act play with the last part still on. While the Supreme Court's ornate court room remains to be the setting until the last scene what has however undergone a dramatic transformation are the characters of those acting as judges and crowding the stage as litigants. Furthermore, the judges who are the story's scriptwriters continue to be its prominent characters as well.

A. Part I: 1950 – 1978 (Ascendancy of Property rights)

The play opens in the year 1950 with India's first Chief Justice Kania and his robed brethren embarking on their ordained task to uphold the infant republic's constitution. A.K. Gopalan, a Communist leader detained under the Preventive Detention Act, 1950 (PDA) is the first entrant on the human rights stage.[304] Contending that the word "law" in Article 21[305] does not mean mere state-made law, he argues that the procedure - curtailing his right to life - in the PDA must be infused with natural justice if it has to be constitutionally sound.[306] Sadly, turning deaf to this cogent plea, the Court affirms the validity of the PDA.[307]

It is still the early years of the republic. Following Gopalan, a majority of the litigants streaming on the stage are disgruntled landlords, *zamindars* and distraught princes distressed at being stripped of either their lands with little compensation or royal privileges.[308] And it is

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[304] *A.K. Gopalan v State of Madras*, AIR 1950 SC 27, 31-32 (Judgement of Kania, J) [*Gopalan*]

[305] See India Const. Art. 21. It is the seminal clause of the Indian Constitution and reads:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

Hereinafter the terms "Article 21" and "right to life" shall be used interchangeably.

[306] *Gopalan, supra* note 304 at 32. It is on this basis that he challenges the validity of the Preventive Detention Act, 1950.

[307] *Ibid.*

[308] During the first two decades, Parliament and the Supreme Court were locked in a fierce battle over land reform legislation and issues of compensation for expropriation of private property and the abolition of the privy purses. The Court aligned itself with the propertied classes and repeatedly blocked Parliament's attempts to water down the right to property through constitutional amendments to implement the directive principles. In *Golaknath v State of Punjab*, AIR 1967 SC 1643 the Court affirmed the primacy of fundamental rights over Directive Principles and held that Parliament had no power to amend the fundamental rights including the right to property. The Court's anti-poor judgments became an issue in the

the right to property and the successive amendments made by Parliament to narrow it down to implement the Directive Principles that are the topics around which the storyline and dialogues of these characters now veer.[309]

By the time the curtains come down on the first part of the human rights play, two and a half decades have sped by with the Court's narrow ruling in Gopalan holding the field, its alignment with the propertied classes leaving unfulfilled the constitution's social justice promise and its subsequent kowtow to the executive, transforming India - a constitutional democracy - into a constitutional dictatorship.[310]

B. The Post-Emergency Period or Part II: 1978 – end of eighties

The year is 1978. The play reopens for its second part against the backdrop of a public exultant at having ushered in a new government that promised to resuscitate constitutional safeguards extinguished during the dreaded emergency. There is fervour of freedom in the air with the judiciary, press, civil servants, and the public all determined to disallow their liberties from being eclipsed ever again.

A young citizen, Ms. Maneka Gandhi is challenging the government's impoundment of her passport without affording her an opportunity of being heard in her defence. Supreme

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1971 general elections and Mrs. Gandhi who was swept to power on her popular "drive away poverty" slogan enacted a series of constitutional amendments that made any law implementing *any or all* of the directive principles immune from judicial review. In the historic case of *Keshavananda Bharati v State of Kerela*, AIR 1973 S.C.1461 a thirteen-judge bench elaborating on the scope of Parliament's constituent powers, conceded that although Parliament had unlimited powers to amend any part of the constitution (including the right to property), however such sweeping away of judicial review was destructive of the "basic features" or "basic structure" of the constitution and untenable.

[309] See *e.g. Keshavananda Bharati v State of Kerela*, AIR 1973 S.C.1461 (declaring constitutional supremacy and judicial review to be the pillars on which the constitutional cathedral is mounted and which are immune from the crushing impact of even a constitutional amendment); *Minerva Mills v Union of India*, A.I.R. 1973 SC 1461. See Jaswal, *Directive Principles Jurisprudence, supra* note 295 at 164-174.

[310] In 1975, the then Prime Minister, Mrs. Gandhi declared an "emergency" ostensibly to safeguard the country's unity from "internal disturbances" but in effect to perpetuate her rule. During the emergency, opposition parties' leaders were tossed into prison, the press was muzzled, strong willed judges were arbitrarily transferred or superseded and the constitution and the fundamental rights therein suspended. In *Additional District Magistrate v. Shivkant Shukla*, A.I.R. 1976 SC 1207, the Supreme Court unfortunately upheld this emergency and declined to issue a writ of *habeas corpus* for the enforcement of the plaintiff's right under Article 21. In March 1977, when Mrs. Gandhi lifted the emergency and called for general elections, she and her party, were as expected, routed in the hustings. The Janata party that came to power enacted the 44th Constitution Amendment Act, 1978 to undo the damage inflicted on the constitution by Mrs. Gandhi.

Court justices Krishna Iyer[311] and P.N. Bhagwati[312] – the principal characters and in a sense the scriptwriters of the unfolding human rights story - are part of the bench deciding the case.[313] In a remarkable show of judicial statesmanship, the Court overrules its 1950 holding[314] and declares that "life" in Article 21 does not mean mere animal existence and that the overarching purpose of fundamental rights is the self-development of a person.[315] It asserts the doctrine of substantive due process as integral to Part III and emanating from a collective understanding of the scheme underlying articles 14 (the right to equality), 19 (the fundamental freedoms) and 21 (the right to life).[316] It affirms that any procedure that curtails life and liberty must be "just, fair and reasonable."[317] The procedure cannot be "arbitrary, fanciful or oppressive." [318]

Post-1978: The far-reaching impact of *Maneka*'s ruling is visible from the assorted characters, now armed with novel issues and using untraditional methods[319] flocking to the Court for redress: prisoners,[320] slum-dwellers,[321] bonded laborers,[322] fiery journalists,[323] zealous environmentalists,[324] social-activist law school professors,[325] public interest lawyers and non-governmental organizations.[326]

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311 See generally Krishna Iyer, *Constitutional Miscellany* (Lucknow: Eastern Book Company, 1986)

312 See generally P.N. Bhagwati, "Social Action Litigation: The Indian Experience " in Neelan Tiruchelvam & Radhika Coomaraswamy, eds., *The Role of the Judiciary in Plural Societies* (New York: St. Martin's Press, 1987) 20.

313 *Maneka Gandhi v Union of India*, A.I.R. 1978 S.C. 597 [*Maneka Gandhi*]

314 *Gopalan, supra* note 304.

315 *Maneka Gandhi, supra* note 313 at 620.

316 *Ibid.* at 622-23.

317 *Ibid.* at 622

318 *Ibid.*

319 See epistolary jurisdiction, *infra* note 347 and accompanying text.

320 See *e.g. Sunil Batra v Delhi Administration, A.I.R. 1978 SC 1675* (prohibiting the prescription of extra-judicial punishments like imposition of solitary confinement by prison authorities without judicial supervision); *Sunil Batra v Delhi Administration, A.I.R. 1980 SC 1565* (expanding prisoners' fundamental rights to include freedom from mental and physical torture); *Charles Sobraj v Delhi Administration*, A.I.R. 1978 S.C. 1590 (prohibiting the use of chains and fetters on prisoners); *Prem Shanker Shukla v Delhi Administration*, A.I.R. 1980 SC 1535 (prohibition handcuffing of prisoners without judicial sanction) *Francis Coralie Mulin v Union Territory of Delhi*, A.I.R. 1980 S.C. 849 (articulating the right for prisoners and detainees to meet with their lawyers)

321 See *e.g. Olga Tellis v Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180

322 See *e.g. Bandhua Mukti Morcha v Union of India*, A.I.R. 1982 SC 802

323 See *e.g. Sheela Barse v State of Bihar*, A.I.R. 1981 S.C. 1543; *Sheela Barse v State of Maharashtra*, A.I.R. 1983 S.C. 1543; *Sheela Barse v Secretary, Children Aids Society*, A.I.R. 1987 S.C. 656; *Sheela Barse v Union of India*, A.I.R. 1986 S.C. 1773; *Hussainara Khatoon v Home Secretary, State of Bihar*, A.I.R. 1979 SC 1360

324 See *e.g. Rural Litigation & Entitlement Kendra v State of Uttar Pradesh*, A.I.R. 1985 S.C. 652 (ordering the closure of limestone quarries in the Himalayan mountain ranges on the grounds that their operation were upsetting India's ecological balance and harming the environment); *M.C. Mehta v Union of India*, A.I.R. 1987 S.C. 1086.

What do the judges do then? Do they forsake these new litigants and their legitimate causes and revert to their earlier role of simply presiding over adversarial proceedings and passing orders? How do they draw from constitutional normativity to carve new rights and design novel remedies? In short, how did the Supreme Court of India morph itself into the "Supreme Court for Indians"?[327] This is, in essence, the story of constitutionalism and rights in India.

a. A Substantive Vision of Social Justice – An Array of New Economic and Social Rights

Following Maneka Gandhi, the Court sought to address broader social issues and thus began to protect socio-economic rights. How did it do this? Using the flavour of Directive Principles to enrich the content of the right to life, it carved out an array of social and economic rights including the right to live with dignity, right to a livelihood, right to free legal aid, freedom from pollution or right to a clean environment, right to education, right to health and medical care, right to shelter and right to food. Maneka Gandhi's historic ruling triggered the blossoming of Article 21 in the criminal justice realm as well.[328] It was the early social rights jurisprudence (of the late eighties) of the Supreme Court and the lessons of the Indian experience that inspired and informed South Africans in their tumultuous journey of sculpting a transformative constitution.[329]

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[325] *Upendra Baxi v State of Uttar Pradesh*, A.I.R. 1987 SC 191

[326] See *e.g. People's Union for Democratic Rights v Union of India*, A.I.R. 1982 S.C. 1473; *People's Union for Democratic Rights v Union of India*, A.I.R. 1985 Del. 268; *People's Union for Democratic Rights v Union of India*, A.I.R. 1987 S.C. 355

[327] Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," in, Tiruchelvan & Coomaraswamy, *supra* note 312, 32 at 32.

[328] See *e.g. Sunil Batra v Delhi Administration*, AIR 1978 SC 1675 (right to lead a convict's life in prison with dignity and freedom from torture); *Prem Shanker v Delhi Administration*, AIR 1980 SC 1535; *Citizens for Democracy Through its President v State of Assam*, AIR 1996 SC 2193 (freedom from cruel and unusual punishment or treatment); *Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360 (right to speedy trial) *Kedra Pahadiya v State of Bihar*, AIR 1981 SC 1675 (right to speedy trial); *Francis Coralie Mullin v Delhi Administration*, AIR 1981 SC 746 (right to live with dignity which includes right of a detainee to meet her family and lawyers) *Nelabati Behera v State of Orissa*, AIR 1993 SC 1966 (right to be compensated for violation of right to life); *Jolly Goerge Varghese v Bank of Cochin*, AIR 1989 SC 420 (freedom from imprisonment for the non-fulfillment of a contractual obligation).

[329] See *supra* note 15 and accompanying text.

(i) Right to Dignity & Right to Livelihood

In one of its earliest decisions concerning the plight of bonded labourers, the Indian Supreme Court emphatically declared that the right to life included the right to live with human dignity and this right derived its "life breath" from the Directive Principles.[330] Accordingly, the Court ordered the State to identify release and rehabilitate bonded labourers and ensure that they received minimum wages.[331] Significantly, the Court has conceived forced labour as covering situations where workers' "utter grinding poverty" compels them to accept work for less than the minimum wage.[332]

In *Olga Tellis v Bombay Municipal Corporation*, a group of pavement dwellers who were resisting evacuation by the Bombay Municipal Corporation sought the Court's relief.[333] In upholding their pleas, the Court asserted that in light of the State's duty to secure for its citizens an adequate means of livelihood and the right to work,[334] it would be "sheer pedantry to exclude the right to livelihood from the content of the right to life."[335] "Deprive a person of his livelihood and you shall have deprived him of his life" said the Court.[336]

(ii) Right to Free Legal Services

Similarly, drawing support from the Directive Principle of free legal aid[337] the Court created a socially sensitive judicial process by carving the right to free legal services from Article 21.[338]

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330 *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802. The Court also ordered the State to improve their working conditions in the quarries by installing dust-sucking and drinking water machines. *Ibid.* The Directive Principles the court looked to for guidance included Art. 39(e) (health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.) *Ibid.*

331 A.I.R. 1984 S.C. 811.

332 See *People's Union for Democratic Rights v Union of India*, AIR 1982 SC 1473, 1490.

333 AIR 1986 SC 180.

334 *Ibid.* at 193. See India Const. Arts. 39(a), 37 & 41; See M.P. Jain, *Indian Constitutional Law* (New Delhi: Wadhwa and Company, 2003) at 1312.

335 AIR 1986 SC 193; See also Jain, *supra* note 330 at 1312.

336 See Jain, *supra* note 334 at 811-812 (quoting the Court).

337 See India Const. Part IV, Art. 39A:

> Equal justice and free legal aid: The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in, particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

It reasoned that "a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer cannot possibly be regarded as fair just and reasonable."[339]

(iii) Right to a Clean and Wholesome Environment

In 1978, the conferment of a new duty on the State to protect and improve the environment[340] led to the greening of the constitution and to the further protection of broad social interests under the Article 21 umbrella. Reiterating that life in Article 21 meant a quality life, the Court held that a person's right to live with human dignity would be violated if she is compelled to eke out her existence in a polluted, unhygienic, and unhealthy environment.[341] On this basis, the Court halted mining in limestone quarries,[342] shut down tanneries which were polluting water,[343] slapped heavy fines on polluting industries and compelled them to compensate their environmentally injured victims and pay for the cost of the damaged ecology,[344] and called for the creation of powerful environmental courts.[345]

(iv.) Novel Procedural Remedies to Advance Social Justice

The Supreme Court of India did not stop here. It also designed socially sensitive procedural innovations. First, by relaxing the stern Anglo-Saxon principle of *locus standii* it began to allow public spirited citizens to approach it on behalf of those who by reason of "poverty, helplessness or disability or social or economically disadvantaged position were unable to do so."[346] Furthermore, the recognition of "epistolary jurisdiction" allowed many helpless

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Originally, the constitution did not contain this Directive Principle. It was inserted in the constitution by the 42nd Constitution (Amendment Act) 1976

338 See *e.g. Hussainara Khatoon v Home Secretary, State of Bihar,* A.I.R. 1979 SC 1360.

339 *Ibid.* at 1373; *Khatri v State of Bihar,* AIR 1981 SC 928 (holding that governments cannot use the pretext of financial or administrative inability to escape their constitutional obligation).

340 See India Const. Art. 48a. This Directive Principle was inserted in the Constitution in 1976.

341 See *e.g .Rural Litigation & Entitlement Kendra v State of Uttar Pradesh,* AIR 1987 SC 359; Sri *Satchinanda Pandey v State of West Bengal,* AIR 1987 SC 1109; *M.C. Mehta v Union of India,* AIR 1987 SC 1086; *Subhash Kumar v State of Bihar,* AIR 1991 SC 420.

342 *Rural Litigation & Entitlement Kendra v State of Uttar Pradesh,* AIR 1987 SC 359

343 See *e.g. M.C. Mehta v Union of India,* AIR 1997 SC 734; *Vellore Citizens' Welfare Forum* v *Union of India,* AIR 1996 SC 2721.

344 See *e.g. Tarun Bhagat Sangh Alwar v State of Uttar Pradesh,* AIR 1993 SC 293.

345 See *A.P. Pollution Control Board v M.V. Nayudu,* AIR 1999 S.C. 812

346 See *S.P. Gupta v Union of India,* AIR 1982 SC 149, 188; See *e.g.* cases cited in *supra* notes 316-322.

persons to ring the constitutional bell of justice through a simple post card or telegram.[347] Where it has been difficult for public spirited citizens or organizations to establish or prove effectively rights violations the Court has come to their assistance by appointing social activists, teachers, journalists and judicial officers as commissioners for fact and data gathering purposes and making appropriate recommendations under judicial supervision.[348] The Court's zeal to dispense distributive justice and enforce the performance of "public duties" by the monolithic state bureaucracy has also led to its involvement in administrative implementation.[349] For example, in a case involving the pitiable conditions in a mental institution the Court went to the extent of determining the amount to be allocated for providing meals and scaling up the limit officially placed for purchase of drugs.[350]

Part III: The Nineties till date[351]

(v.) Right to Health and Medical Care

Although it was not until 1995 that the Court clearly carved out a right to health from Article 21, glimpses of this right's origins can be detected in the links the Court drew between quality of "life" in Article 21 and the health of a person in its environmental and prison jurisprudence.[352] References to right to health can be found in five Directive Principles[353]

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347 See *e.g. Sunil Batra v Delhi Administration, [II]* AIR 1980 SC 1579 (where the Court took cognizance of a complaint in a post card written by a death row convict); *Nilabeti Behera v State of Orissa,* AIR 1993 SC 1960 (a letter written by a poor widow complaining of the disappearance of her son was accepted by the Supreme Court) Beginning from the late seventies , a "Public Interest Cell" for receiving and culling out bonafide postal complaints for further judicial attention, has become an integral part of the Supreme Court.

348 See P.N. Bhagwati, "Social Action Litigation: The Indian Experience," in Tiruchelvan & Coomaraswamy, *supra* note 312, 20 at 25-26.

349 Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," in, Tiruchelvan & Coomaraswamy, *supra* note 312, 32 at 42.

350 See *e.g. Rakesh Chand Narain v State of Bihar,* AIR 1978 SC 928; See also *Upendra Baxi v State of Uttar Pradesh,* A.I.R. 1987 SC 191 (giving directions for the day to day working of the Agra Protective Home for Women).

351 See Harish Khare, *Judicial Activism: The Good and the Not So Good* The Hindu, March 2, 1997 at 11. Although by the end of the eighties the emergency's brutalities had long receded from public memory, the early nineties ushered in an era of corruption scandals which drove home the point that emergency excesses are no different from daily excesses of raw state power and that vigilance is the price of democracy. Besides, "public interest litigation" [PIL] some critics cried had degenerated into "publicity interest" litigation and had become a useful weapon in the hands of those who wanted to misuse the courts to wreak political vengeance on their opponents or gain undue publicity for themselves. *Ibid.*

352 See *e.g. Sunil Batra v Delhi Administration,* AIR 1980 SC 1579. The court outlawed imposition of solitary confinement even on a death-row convict on the ground that life under Article 21 did not mean mere animal existence but a life of dignity. Therefore, any procedure that curtailed his right to life - and in his case it was the imposition of solitary confinement - destroyed his mental health it violated his right to live with dignity under Article 21.

and drawing from these sources, the Court for the first time in a case involving occupational health hazards of workers in the asbestos factories, held that "right to health, and medical aid to protect the health and vigour of a worker while in service or post-retirement" is integral to Article 21.[354] This right, said the Court, made the "life of the workman meaningful with the dignity of person." [355] Significantly, the Court pointed out that its directions given in this context applied to both state and private authorities.[356]

Scarcity of resources is often a ground for non-enforcement of social rights or not making them judicially enforceable. Earlier, this issue had cropped up in the state implementation of free legal services and the Court had emphasized that financial constraints were no excuse for the State to forego its constitutional obligations.[357] Faced with the same issue in *Paschim Banga Khet Mazdoor Samity v State of West Bengal* where a hapless labourer who, on being refused proper and timely emergency treatment at a series of government hospitals, incurred heavy expenditure at a private hospital, the Court repeated its earlier warning and directed the government to compensate the labourer.[358] Since a government's primary duty in a welfare state is to provide adequate medical facilities, the Court found the failure by the government hospital to provide timely medical treatment to a needy person a violation of his right to life.[359] However, the Court did not stop there. It went on to list positive steps that the government needed to take to improve emergency health care infrastructure and services.[360] The Court emphasized that what was needed was a "time-bound" plan for providing these services.[361]

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353 See *e.g.* India Const. Art. 47 (State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties); Art. 38 (State has to secure a social order for the promotion of the welfare of the people); Art. 39 (e) (health of workers, men, women and children must be protected against abuse); Art. 41 (The State shall make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want); Art. 48 (a) (State's duty protect and improve the environment).

354 See *Consumer Education & Research Centre v Union of India*, AIR 1995 SC 922

355 *Ibid.* at 940.

356 *Ibid.*

357 See *e.g. Khatri v State of Bihar*, AIR 1981 SC 928, 931.

358 AIR 1996 SC 2426 ["*Paschim*"]

359 *Ibid.* at 2429

360 *Ibid.* at 2430-2432.

361 *Ibid.* at 2432.

(vi.) Right to Food

The constitution touches on the issue of the right to food only tangentially when it enjoins the State to raise the levels of nutrition.[362] However, in a spate of cases that focussed judicial attention on the shocking "starvation deaths" in certain drought-prone regions in India, the Court has issued several directions to the Union (federal) and state governments, including directing them to implement fully eight different centrally-sponsored food-security schemes and to introduce cooked mid-day meals in all government and government-assisted schools.[363] Significantly, besides declaring these food security schemes as entitlements (rights) of the poor, the Court also set down specific time-limits for the implementation of these schemes and enjoined the States to submit timely and regular compliance affidavits to it.[364] Reiterating that Article 21 guarantees the right to live with human dignity, the Court affirmed that this right was in peril for families who were driven to starvation because of non-implementation of food schemes.[365]

4.4. Constitutionalization of Human Rights in South Africa

A. Sculpting Transformative Constitutionalism

a. Equality and Social Justice

The South African Constitution states that its Bill of Rights is a "cornerstone of democracy" and "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."[366] Significantly, the rights are made applicable not only vertically between individuals and the state, but in certain circumstances also

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362 See India Const. Art. 47 (State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties).

363 See Kamayani Bali Mahabal, *Enforcing the Right to Food in India – The Impact of Social Activism* (manuscript on file with the author); Right to Food Campaign, Supreme Court Orders and Related Documents (*PUCL v Union of India & Others, Writ Petition (Civil) 196 of 2001*, online: <http://www.righttofoodindia.org/orders/interimorders.html>.

364 See "Text of the Order of May 2, 2003" reprinted in *Right to Food Campaign, Supreme Court Orders and Related Documents (PUCL v Union of India & Others, Writ Petition (Civil) 196 of 2001)* at 14, online: <http://www.righttofoodindia.org/orders/interimorders.html>.

365 *Ibid.*

366 South Africa Const. Art. 7 (1)

horizontally between individuals and other private institutions.[367] Article 39 calls the courts in the interpretation of rights to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[368]

As with the Indian Constitution, the orientation of the South African Constitution regarding equality and social justice can be gleaned from its provisions relating to equality, property rights and economic, social and cultural rights. The white minority leaders and the ANC conceptualized the role of constitutionalism and a bill of rights in a post-apartheid South Africa in two diametrically opposite ways. The ANC understood constitutionalism to be both a check on the state's predatory impulses and a means to empower the state to erase the vast inequalities it would inherit from apartheid.[369] However, the White Minority wedded to the nineteenth-century liberal conception of constitutionalism visualized the bill of rights as a tool solely to protect the status quo from state interference.[370] These tensions surrounded the constitutionalization of property rights and socio-economic rights in South Africa.

A commitment to a more inclusive and egalitarian regime is a vital building block in a transitional society, particularly one such as South Africa given its painful past of racial inequalities and racial segregation. It is no wonder then that the framers of the South African constitution declared in their evocative preamble:

> We the people of South Africa ... believe that South Africa belongs to all who live in it, united in our diversity. We therefore... adopt this constitution as the supreme law of the Republic so as to *heal the divisions of the past* and *establish a society based on democratic values, social justice, and fundamental human rights.*[371]

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[367] *Ibid.* at §8 (2)

> A provision of the Bill of Rights binds natural and juristic persons, if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.

[368] *Ibid.* at §39 (1)(a). This article also requires courts to consider international law and permits them to even consider foreign laws. I will revisit this point later in this section.

[369] See Klug, *Globalism and South Africa, supra* note 36 at 91; See also Katharine Savage, "Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiation Process" in Andrews & Ellman, *supra* note 8, 164 at 177.

[370] See Klug, *Globalism and South Africa, supra* note 36 at 90.

[371] See South Africa Const. Preamble (emphasis added).

As a first step, the South African Constitution guarantees not only formal equality but also substantive equality.[372] The equality clause was strengthened in the 1996 Constitution by the addition of this substantive dimension to it.[373] Furthermore, a "restitutionary" dimension to equality is endorsed by providing for affirmative action for the advancement of persons previously disadvantaged by unfair discrimination.[374]

Being a recently written constitution, the South African Constitution has sexual orientation – an issue that has grabbed public and international attention only lately - as one of the explicitly prohibited grounds for discrimination.[375] Furthermore, the prohibition on discrimination extends also to private persons.[376]

b. Right to Property

Given South Africa's utterly discriminatory land regime during the apartheid era, the topic of the constitutionalization of the right to property evoked strong feelings on both sides. The opponents saw in the constitutionalization of property rights the perpetuation of white privileges and the racially-skewed maldistribution of property and those who favored its inclusion in the constitution argued that its presence that document would boost investor confidence.[377] The 1996 Constitution reflects this balancing of interests because it is both backwards and forward-looking.[378]

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372 *Ibid.* at § 9. See Iain Currie & Johan de Waal, *The Bill of Rights Handbook* (Landsdowne: Juta and Company, 2005) at 232-233.

373 See Sarkin, "Framing the South African Constitution", *supra* note 202, 67 at 80. The term "right to equal benefit of the law" was added in the 1996 Constitution. *Ibid.* See South Africa Const. Section 9 (1) & (2) :

> Everyone is equal before the law and has the right to equal protection and benefit of the law.
> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

374 See Currie & de Waal, *supra* note 372 at 233.

375 See *e.g.* Treaty of Amsterdam, Art.13, online: <http://europa.eu/scadplus/leg/en/lvb/a10000.htm> This is the first international treaty that explicitly mentions and protects sexual orientation.

376 See Currie & de Waal, *supra* note 372 at 233.

377 *Ibid.* at 533.

378 See South Africa Const. Chapter 2, § 25 (Right to Property)

What does the property clause do? It first protects private property from confiscation by the state and requires any expropriation of property to be compensated.[379] It however has a distributive dimension which is clear from its mandate that the property may be taken for the purpose of land reform and to other reforms devised to bring about equitable access to all of the nation's natural resources.[380] The right also entitles a person or community whose land tenure is legally insecure due to past racially discriminatory laws or practices to legally secure tenure or comparable redress.[381] Furthermore, a person or community who has had his property dispossessed after June 19, 1913 as a result of past racially discriminatory laws or practices is entitled to restitution or equitable redress.[382] And it is for the Parliament to determine the scope of rights to tenure and restitution.[383] Finally, the property clause categorically states that nothing in it "may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.

c. Cultural Rights

The South African Constitution confers on "everyone" the right to use the language and to participate in the cultural life of her choice, consistent with the bill of rights.[384] Furthermore, it guarantees persons belonging to a cultural, religious, or linguistic community in conjunction with others to "enjoy their culture, practise their religion and use their language and to form associations for this purpose."[385] Finally, the Constitution provides for the creation of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[386] This provision was formulated with an eye towards traditional leaders and some of the right-wing sections of the population.[387] The institution, status and role of traditional leadership according to customary law are subject to the constitution and courts must apply customary law so long as it is consistent with the

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379 *Ibid.* at, § 25 (1) & (2)(b).
380 *Ibid.* at § 25 (4) (a).
381 *Ibid.* at § 25 (6).
382 *Ibid.* at § 25 (7).
383 *Ibid.*
384 *Ibid.* at § 30.
385 *Ibid.* at § 31.
386 *Ibid.* at Chapter 9, § 185
387 Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims" (2000) 21 Cardozo L. Rev. 1095 at 1128. [Ghai, "Universalism and Relativism"]

constitution and relevant legislation.[388] This approach according to Prof. Ghai represents a significant victory for African women, given their inferior status under traditional customary law.[389]

d. Social and Economic Rights

The transformative character of South African Constitutionalism is manifest in its recognition of social rights as judicially enforceable rights. An affirmation of the indivisibility of human rights can be found in the South Africans' aspirations for "houses, security and comfort" amongst other civil and political rights in their ringing declaration of 1955.[390] However, given the difficulty of adjudicating socio-economic rights claims and the paucity of resources, it is not surprising that the question of whether and how to constitutionalize socio-economic rights that arose during India's constitution-making also hovered over the proceedings of the South African Constitutional Assembly.[391]

An intense academic and public debate on this question had preceded the final decision to include a broad array of socio-economic rights as judicially enforceable rights in the Constitution.[392] Three distinct positions had congealed in the debate on this topic.[393] While some supported the idea of making socio-economic rights mere aspirational goals, some others plumped for listing them as non-enforceable "guiding principles" in the Constitution.[394] The third current favoured coining appropriate language to make socio-economic rights as enforceable constitutional rights.[395]

When it came to finding guidance from other constitutional experiences on this matter, the only precedents that the South-African constitution-makers had were that of the Irish and the Indian examples.[396] And in both these countries, socio-economic rights had been

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388 See S. Afr. Const. ch. 9, art. 185
389 See Ghai, *"Universalism and Relativism," supra* note 387, 1095 at 1129.
390 See Freedom Charter of 1955 reprinted in Ebrahim, *Soul of a Nation, supra* note 12 at 415-419
391 See Sandra Liebenberg, "The Interpretation of Socio-Economic Rights" in S. Woolman *et al* eds. *Constitutional Law of South Africa* (Kenwyn: Juta, 2001) 33-i at 33-3.
392 *Ibid.* See Albie Sachs, "The Judicial Enforcement of Socio-Economic Rights – The Grootbom Case" at 5. (manuscript on file with the author). [Sachs, "The Grootbom Case"]
393 *See* Sachs, "The Grootbom Case" *supra* note 392 at 5.
394 *Ibid.*
395 *Ibid.*
396 *Ibid.*

constitutionalized but as non-enforceable directives of state policy.[397] However, the South African leaders were also conversant with the interesting twist in the Indian constitutional story, that is, the Supreme Court's "creative" use of Directive Principles to enrich the texture and substance of enforceable civil and political rights.[398]

In this context, it is relevant to ask what lessons international human rights law had to offer to South Africans in their quest for making socio-economic rights judicially enforceable? After all, by the time South Africa's constitutional moment had arrived, the cold war and the attendant cleavage in the concept of human rights had faded and the world community had reiterated the indivisibility and inter-dependence of human rights.[399] According to Sandra Liebenberg, the relevant minutes and memoranda prepared during the drafting process demonstrate the strong influence of international human rights law on the drafting of socio-economic rights.[400] Indeed, the South African constitutional drafters drew the concepts of progressive realisation and resource capability[401] from the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)[402] and the impetus for such borrowing stemmed from their desire to make their constitutional law consonant with international human rights norms and nudge their courts towards using international law as tools of interpreting these socio-economic rights.[403]

Thus, one finds in the South African constitution a broad array of socio-economic rights: right to adequate housing,[404] right to health care, food, water and social security,[405] and the right to environment.[406] The constitution also guarantees a right to basic education, which extends both to children and adults.[407]

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397 *Ibid.*
398 *Ibid.*
399 See *e.g.* The Vienna Declaration and Program of Action adopted by the World Conference on Human Rights, June 1993, UN docA/Conf157/23, part I, para 5.
400 See Liebenberg, "The Interpretation of Socio-Economic Rights" in S. Woolman *et al supra* note 391, 33-i at 33-4.
401 *Ibid.* See also S. Afr. Const., Ch. 2, § 26-27
402 Art. 2, International Covenant on Civil and Political Rights, reprinted in *A Compilation of International Instruments, supra* note 9 at 41-60.
403 Liebenberg, "The Interpretation of Socio-Economic Rights" in S. Woolman *et al supra* note 391, 33-i at 33-3 - 33-4.
404 S. Afr. Const. Chapter 2, § 26
405 *Ibid.*
406 *Ibid.* at § 27
407 *Ibid.* at § 29

e. Access to Justice

The South African Constitution also affirms its commitment to social justice by ensuring that even the poor, downtrodden and vulnerable have access to justice. It empowers vulnerable groups by explicitly expanding the categories of persons who may approach a court for redress. "Anyone acting as a member of, or in the interest of, a group or a class of persons"[408] and "anyone acting in the public interest"[409] may also approach the court alleging that a right in the Bill of Rights has been infringed or threatened.

B. South African Socio-Economic Jurisprudence

The Constitutional Court has pronounced important decisions on these socio-economic rights of which the three cases examined here are the foundational ones. *Soobramoney v Minister of Health*, presented the Constitutional Court with its first opportunity to flesh out the social rights contained in the 1996 Constitution. This was a health rights case and the petitioner, an unemployed man in the final stages of chronic renal failure approached the court to direct a provincial hospital to provide him with ongoing dialysis treatment.[410] The complainant relied on the right to life[411] and the right to emergency medical treatment[412] and argued that without this treatment he would die since he could not afford to take treatment at a private clinic.[413] The Constitutional Court considered the applicability of sections 27(1) and (2) and having found no breach of the aforementioned sections it dismissed the appeal.[414]

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[408] *Ibid.* at § 38 (c)
[409] *Ibid.* at § 38 (d)
[410] 1998 (1) SALR 765 (CC)
[411] S. Afr. Const. § 11
[412] *Ibid.* at § 27 (3)
[413] 1998 (1) SALR 765 (CC)
[414] *Ibid.* See South African Const. § 27 (1) & (2) :

> (1) Everyone has the right to have access to
> a. health care services, including reproductive health care
> b. sufficient food and water; and
> c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights.

The Court drew from recent Indian jurisprudence to carve out the scope of the right to emergency medical treatment and contended that this right is eminently applicable to the situation that arose in the Indian case of *Paschim.*[415] In *Paschim*, although the petitioner had sustained grievous head injuries, he was denied emergency care at various public hospitals either because the hospital did not have the necessary facilities for treatment, or because it did not have room to accommodate him.[416] The essence of the right to emergency medical treatment then is nothing but freedom from arbitrary denial or exclusion of emergency medical care that is available.[417] It however does not create a positive constitutional obligation on the state to ensure emergency medical treatment.[418] Therefore, Soobramoney's demand to receive treatment at a state hospital did not fall within the scope of the right to emergency medical treatment.

In *The Government of the Republic of South Africa v Grootbom*[419] a group of adults and children were rendered homeless on a sports field after they had been evicted from a private land. They were now vulnerable to the forces of nature and had no adequate shelter from the elements.[420] The Constitutional Court ruled that the government's housing program had been framed without factoring in those in desperate need of housing and thus failed the test of the constitutional standard of reasonableness.[421] It appears that the reasonableness review adopted by the Court does not confer a right upon any individual to claim concrete goods and services from the State.[422] Although the Constitutional Court was criticized for its narrow ruling in Soobramoney,[423] Grootbom was hailed "as an interpretation that gives social rights their due, taking the position of the weakest and most vulnerable members of

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415 *Ibid.* at para 18; *Paschim, supra* note 358.
416 *Ibid.*
417 *Ibid.* at para 20
418 *Ibid.* See generally Craig Scott & Philip Alston, "Adjucating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootbom's Promise" (2000) 16 SAJHR 206.
419 2001 (1) SALR 46 (CC)
420 *Ibid.* at paras 9-11. See also Sachs, "The Grootbom Case" *supra* note 392 at 1.
421 2001 (1) SALR 46 (CC) (para 33).
422 *Ibid.* at para 95. The Court stated:

> Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand.

423 See *e.g.* Denis Davis et al. "Social Rights, Social Citizenship, and Transformative Constitutionalism: A Comparative Assessment" in Joanne Conaghan et al eds., *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) 511 at 524.

the community into account when deciding whether the government's delivery measure and policies are ...constitutionally adequate."[424]

In the third major case, Treatment Action Campaign (TAC) the restricted nature of the measures introduced by the State to prevent mother-to-child transmission (MTCT) of HIV was challenged on two grounds.[425] The first contention was that the State's ban on the administration of the anti-retroviral drug, Nevirapine, beyond the limited number of designated research and training sites was unreasonable.[426] Secondly, the State was impugned for failing to produce and implement a comprehensive national program for the prevention of MTCT of HIV.[427] The Court held that the government must devise and implement, within its available resources, a comprehensive and coordinated program ... progressively [enabling] pregnant women and their newborn children to have access to health services."[428]

This evolving jurisprudence indicates that the Constitutional Court views the bill of rights as a transformative document aimed at erasing South Africa's deeply entrenched social and economic inequalities.

C. SUMMING UP

A core set of civil and political rights contained in the UDHR finds a place in both the Indian and South African Constitutions. However, the following five civil and political rights: freedom from torture, right to human dignity, right to political participation, freedom from deprivation of citizenship, and right to privacy that are explicitly listed in the South African Constitution are not listed in Part III. However, some of these rights including freedom from torture and right to human dignity have become a part of India's constitutional dharma thanks to the Supreme Court's judicial exegesis.

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[424] Andre Van der Valt, "Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State" (2001) 118 SAJHR 258 at 310.
[425] 2002 (5) SALR 721 (CC)
[426] *Ibid.*
[427] *Ibid.*
[428] *Ibid.* at 764-765.

Both Indian and the South African constitutional framers have used the framework of rights to negotiate differences, claims and balance interests. The balancing of interests is perhaps nowhere more clearly evident than in relation to property and social justice provisions in both the constitutions. Furthermore, as discussed above, protection of property affected the legitimation of constitutions in both the countries.

Both the Indian and South African Constitutions empower the Federal Legislature to amend the bill of rights.[429] While the Indian constitution-makers imposed only a procedural limitation on the constituent powers of parliament,[430] the Supreme Court however, introduced a *substantive* limitation rooted in the "basis structure" doctrine on these powers.[431] Accordingly, certain "basic features" of the constitution including the principles of judicial review and constitutional supremacy have been judicially declared as immune from the crushing impact of even a constitutional amendment.[432] Akin to their Indian counterparts, the South African constitution-makers set out a specific procedure for amending their bill of

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[429] For Parliament's constituent powers see India Const. Art. 368; For the National Assembly's constituent powers see South Africa Const. § 72

[430] The amending procedure prescribed by the Indian Constitution differs according to the nature of the constitutional provision that is proposed to be amended. Some provisions can be amended by a special majority of Parliament. In the case of provisions affecting the federal structure of the Indian polity, in addition to a special majority of Parliament, passage of the amendment requires consent of half of the State Legislatures. A simple majority in Parliament can alter some other provisions in the constitution.

[431] See *Kesavananda Bharati v State of Kerela*, AIR 1973 SC (declaring that the power of Parliament to amend the constitution was subject to judicial review and that Parliament's constituent power did not extend to altering the "basic structure" of the constitution). For application of this basic structure doctrine to invalidate constitutional amendments see *Kesavananda Bharati v State of Kerela*, AIR 1973 SC 1461 (deleting the right to property); *Indira Gandhi v Raj Narain*, AIR 1975 SC 2299 (holding clause 4 of the Constitutional (Thirty-ninth) Amendment Act, 1975 unconstitutional because it did the following things: it made the Prime Minister's election unassailable in a court of law and deprived the defeated candidate of the right to dispute the validity of the election by not providing another forum of appeal and it directed the Supreme Court to allow Mrs. Gandhi's appeal and dismiss her opponent Raj Narain's cross appeal). The background of this case is as follows: In June 1975 the Allahabad High Court held the late Mrs. Indira Gandhi guilty of corrupt electoral practices. Mrs. Gandhi appealed as did the respondent Mr. Raj Narain, who filed a cross appeal before the Supreme Court challenging the findings of the Allahabad High Court which found Mrs. Gandhi not guilty only on two accounts. While Mrs. Gandhi's appeal and the respondent's cross-appeals were pending with the Supreme Court, the Congress party enacted the Constitutional (Thirty-Ninth) Amendment Act, 1975 to the constitution.

[432] Subsequent Supreme Court decisions have affirmed the "basis structure" doctrine. These decisions have added supremacy of the constitution, rule of law, the principle of separation of powers, the objectives specified in the Preamble, secularism, the sovereign democratic and republican structure, freedom and dignity of the individual, the principle of equality – "the quintessence of equal justice," the concepts of socio-economic justice and a welfare state, Part IV (in toto), the balance between fundamental rights and directive principles, the parliamentary system of government, the principle of free and fair elections, limitations upon the amending power conferred on the parliament, independence of the judiciary, effective access to justice and certain crucial powers of the Supreme Court including the power of judicial review to the list of inviolable basic features of the constitution that cannot be erased by even a constitutional amendment.

rights.[433] Interestingly, this procedure incorporates an element of indirect public participation in that it calls for the publication of the proposed amendment in the national gazette to generate public debate and the tabling of public comments in the parliament.[434]

Said Arjomand argues that given its powerful sway, one must factor in the international political culture on constitution-making and therefore, the 'timing' of constitution-making is more consequential than the institutional structures of different countries.[435] The impact of the radically different international political cultures amidst which constitution-making in India and South Africa occurred is also best seen in these countries' interaction with the international framework of rights and responsibilities. One finds a symbolic importance to respect international law in the Indian Constitution.[436] While the Indian Supreme Court has frequently used international human rights law to support its constitutional interpretation, it

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[433] See South Africa Const. § 74 (2):

> Chapter 2 (bills of rights) may be amended by a Bill passed by
> a. The National Assembly, with a supporting vote passed at least two-thirds of its members; and
> b. The National Council of Provinces, with a supporting vote of at least six provinces.

[434] *Ibid.* at § 74 (5):

> At least 30 days before a bill amending the Constitution is introduced in terms of Section 73 (2), the person or committee intending to introduce the Bill must
> a. Publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;
> b. submit in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and
> c. submit in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.
>
> § 74 (6):
>
> When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures
> a. to the speaker to be tabled in the National Assembly; and
> b. in respect of amendments referred to in subsections (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.

[435] See Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 131 (quoting S. Arjomand).

[436] See India Const. Part IV, Art. 51. This provision states:

> The State shall endeavor to –
> (a) promote international peace and security
> (b) maintain just and honorable relations between nations;
> (c) foster respect for international law and treaty obligations in the dealings of organized people with one another and;
> (d) encourage settlement of international disputes by arbitration

has recently sharpened the status of international human rights law without abandoning its dualistic approach by holding that:

> The international conventions and norms are to be read into them (fundamental rights) in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for constructing domestic law when there is no inconsistency between them and there is a void in the domestic laws.[437]

In contrast, one finds an exalted status for international law in the South African Constitution wherein it is explicitly set out that the Courts *must* consider international law in the interpretation of rights.[438] In fact, scholars have commented on the readiness of states such as South Africa – especially those states in whose creation, international law played an important role - in embracing principles of international law especially in the area of human rights.[439] Furthermore, the South African Constitution provides that "customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament."[440] It also enjoins the South African courts to *harmoniously construe* legislative provisions with applicable principles of international law in the event of a conflict.[441] With regard to treaties, the 1996 Constitution continues with the pre-1993 interim constitution practice of incorporation but calls for the parliamentary ratification of treaties.[442] In the decade following the commencement of the 1996 Constitution, South African courts have taken their constitutional mandate seriously and have been deferential to international human rights law. Thus although the constitutional positions on reception of international law in the domestic system are not quite the same in both countries, there seems to be a substantive convergence in using international human rights law to enrich constitutional law.

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[437] *Visakha v State of Rajasthan*, AIR 1997 SC 3011. See also *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 625.
[438] S. Afr. Const. § 39(1) [emphasis added].
[439] See *e.g.* Klug, *Globalism and South Africa*, *supra* note 36 at 45; Arun Thiruvengadam & Thomas Franck, "International Law and Constitution-making" (2003) Chinese J. of Int'l L. 467 at 518.
[440] See Thiruvengadam & Franck, *supra* note 439, 467 at 509.
[441] See also S. Afr. Const. § 39(2)
[442] See Thiruvengadam & Franck, *supra* note 439, 467 at 509.

The constitutional pre-commitment to social and economic rights in India can be traced to several factors including the ideological leanings of the elites who were at the vanguard of the freedom struggle and thereafter dominated the constitution-making process. Akin to the INC, the ANC had been wedded to the social and economic rights from its inception as is evident in its Freedom Charter of 1955. However, in South Africa besides political elites civil society also provided the thrust for including social and economic rights in the South African Constitution. For example, a coalition of human rights and labour groups clamored for the explicit recognition of socio-economic rights in the new constitutional order.[443]

Commenting on the foreign influences in the drafting of the South African Constitution Hassen Ebrahim writes that the jurisprudence of countries such as the United States, Canada and India influenced the content of the Bill of Rights.[444] A draft proposal for a bill of rights prepared by the ANC in 1990 included social and economic rights. This document drew and incorporated social justice provisions from the Indian, Irish and Namibian constitutions. Although, some advocated the adoption of socio-economic principles on the lines of the Indian Directive Principles, the proposal was ultimately rejected in favour of judicially enforceable rights.

By liberalizing rules of *locus standii* and enabling any member of the public acting bonafide to commence an action on behalf of the disadvantaged class, claiming legal injury the Indian Supreme Court revolutionized popular access to justice.[445] The inspirational impact of this procedural innovation is evident in the South African bill of rights which provides that "[A]nyone acting as a member of, or in the interest of, a group or a class of persons"[446] and "anyone acting in the public interest"[447] may also approach the court alleging that a right in the Bill of Rights has been infringed or threatened.

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443 Klug, "Participation in the Design: Constitution-making in South Africa" in Andrews & Ellman, *supra* note 8, 128 at 145.
444 Ebrahim, "The Making of the South African Constitution: Some Influences" in Andrews & Ellman, *supra* note 8, 85 at 89.
445 *S.P. Gupta v Union of India,* AIR 1982 SC 149, 188
446 S. Afr. Const. § 38 (c)
447 *Ibid.* at § 38 (d)

5. CONCLUSION

In analyzing the Indian and the South African Constitutions, this study has resisted the mainstream or the dominant comparative constitutional law discourse that identifies the older Western constitutional models or the international human rights system as the models par excellence to which other "latecomers" must aspire to follow. [448] Instead, it has showcased the Indian and South African constitutions for their innovation, arguing that these two texts improve upon the older models.

For example, economic and social rights typically are not considered to be within the core of constitutionalism and few states have been inclined, even in the post-World War II period, to enshrine them in their national founding charters, even though the link between social conditions and the enjoyment of civil and political rights is one of the salient themes of the UDHR. The failure of international law to acknowledge this independence meant that only weak enforcement mechanisms were developed to monitor the implementation of economic, social and cultural rights guarantees. India's constitutional framers, however, chose to recognize socio-economic rights in their constitutions in the form of directive principles, whereas South Africa went so far as to incorporate a list of directly-enforceable socio-economic rights into its constitution.

Acutely aware that immediate achievement of economic advancement and social justice would be well nigh impossible for the infant republic, the framers of India's Constitution nonetheless underscored the State's positive obligations to ensure economic betterment and social justice for the masses and cast these positive obligations as fundamental principles of governance. This vision foreshadowed what was expressed, almost two decades later by the international community in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[449]

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[448] Baxi, *"Constitutionalism," supra* note 5, 1183 at 1184

[449] See Baxi, "Constitutionalism" *supra* note 5, 1183 at 1204. While state parties to the ICCPR are mandated to ensure immediate implementation of the rights expressed therein, the economic, social and cultural rights in the ICESCR Covenant are subject to "progressive realization."

These innovations raise fundamental questions about the role and forms of constitutions. While the classic constitutions such as the U.S. Constitution were designed to create political institutions and limit the powers of the rulers, the contemporary constitutions such as those of the Indian and South Africa seek to radically transform their societies and the structures of power. Although, constitutional rights typically serve as limitations on the powers of the legislature and executive. But interestingly, the framers of the Indian and South African Constitutions were not content to use them merely as restraints on the powers of the government vis-à-vis individual liberty but proceeded to make even civil society subject, at least to some extent, to the ethic and discipline of their respective bills of rights.

Scholars have criticized the discourse surrounding the political participation rights in international human rights instruments for its emphasis on electoral legitimacy rather than promoting more flexible and participatory forms of democracy.[450] Interestingly, the Indian Constitution not only eschews the insidious colonial practice of communal representation and separate electorates by adopting universal adult franchise but also provides for reservation of seats for India's untouchables and members indigenous groups both at the federal and state level.[451] This is another meaningful contribution of Indian constitutionalism to human rights law.[452]

Meanwhile, the African innovation of "participatory constitution-making" with its emphasis on legitimacy and not legality has now become *de rigeur* in many parts of the world. However, as this comparative study demonstrates, one cannot take for granted that the legitimacy of a constitution hinges on participation. On the one hand experience in Zimbabwe and Kenya[453] shows that it is easy to sideline a constitution, which is the product of intense public engagement. On the other hand one can point to instances where constitutions - such as the Indian Constitution - which were made, as we have seen, with limited local participation have survived and become highly respected. The constitutions of Japan and Germany are other apt examples in this regard. It is therefore necessary to be

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450 See *e.g.* Diane Otto, "Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women" (1993) 3 Transnat'l L.& Contemp. Probs. 371.
451 See India Constitution, Arts. 330, 341 - 342.
452 See Baxi, "Constitutionalism" *supra* note 5, 1183 at 1204.
453 See generally Yash Ghai, "A Journey of Constitution-Making." (manuscript on file with the author).

critical of what is now becoming accepted wisdom on the question of legitimacy and participation.

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